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Brief of Reed Esq 130

Appellant's Brief

Filed Dec. 4, 1900.

Supreme Court of the United States.

PACIFIC COAST STEAMSHIP COMPANY, a Corporation,
Appellant,

against

BANCROFT-WHITNEY COMPANY, a Corporation; A. HAAS, J. BARUCH and H. W. HELLMAN, surviving partners of the firm of Heliman, Haas & Company,
Appellees.

BRIEF ON BEHALF OF PACIFIC COAST STEAMSHIP COMPANY, APPELLANT.

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Counsel.

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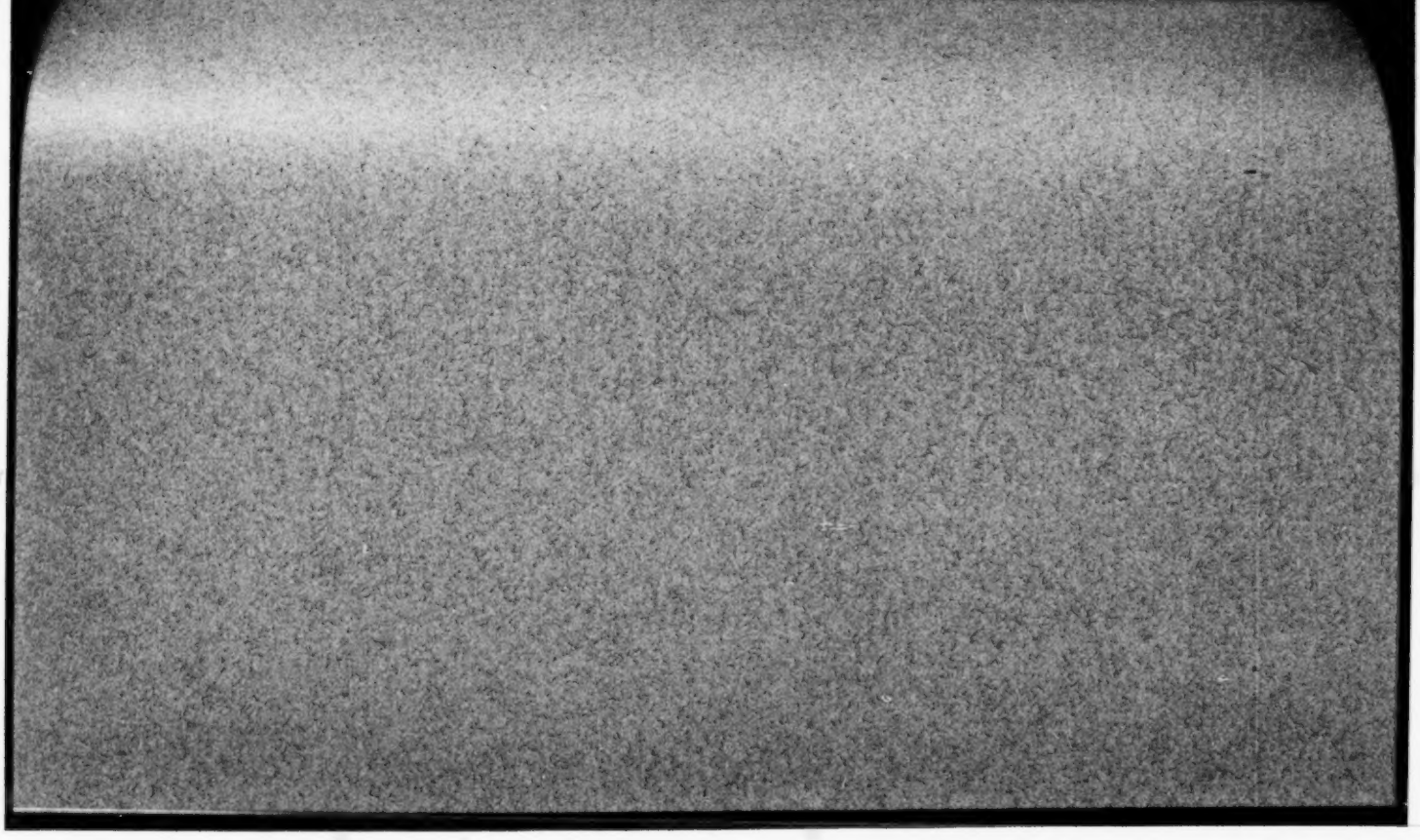

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In the Supreme Court of the United States.

PACIFIC COAST STEAMSHIP COMPANY, a Corporation,
Appellant,

AGAINST

BANCROFT-WHITNEY COMPANY, a Corporation; A. HAAS, J. BARUCH and H. W. HELLMAN, surviving partners of the firm of Hellman, Haas & Company,
Appellees.

BRIEF ON BEHALF OF PACIFIC COAST STEAMSHIP COMPANY, APELLANT.

Statement.

The Pacific Coast Steamship Company, a corporation, respectfully shows as a *statement of the case:*

That at 2 o'clock in the afternoon of the 29th day of April, 1888, its steamship "Queen of the Pacific," otherwise and hereinafter called "Queen," sailed from the port of San Francisco, in the State of California, on a voyage to San Diego and intermediate ports in said State, having on board a cargo of general merchandise, and upwards of 200 persons, certain of which merchandise was owned by and consigned to Hellman,

Haas & Co., a co-partnership, consisting of A. Haas, J. Baruch, H. W. Hellman and Jacob Haas (Record, p. 55), and certain thereof was owned by Bancroft-Whitney Co., a corporation.

That a little more than twelve hours after the "Queen" sailed—that is, at 2:30 o'clock A. M., on April 30, 1888—it was found that water was entering from the sea into a water-tight compartment in the between-decks section of the vessel known as the "starboard alleyway," that compartment being about 100 feet long by 10 feet wide and 9 feet high, and then closed at each end by iron bulkheads, having therein iron doors, which were then closed and fastened with set-screws; and at that time the compartment was stowed full of freight. The port side or wall of the compartment was the iron bulkhead of the engine room, and it was the discovery of water, intermittently flowing through an aperture in that wall about the size of a ten-penny nail, and situate four or five inches above the floor of the "alleyway" and dropping thence onto the floor of the engine room, that first indicated to those on board that anything was wrong with the vessel. Diligent effort was at once made by the master and crew to ascertain the place at which the water was entering the vessel, and, while it was found that the leak was located in the side of the ship within the area of the "starboard alleyway," its exact location could not be ascertained. Up to the time that the water was discovered the steamer had had no appreciable list, but within half an hour thereafter she had gradually acquired a list of six or seven degrees to the starboard, and that fact, and the constant and rapid increase of the list thereafter, indicated to the master that such an aperture had been caused in the side of the ship that it would not be prudent to open the alleyway doors, and that the safety of all concerned required that the steamer should be stranded upon the beach, which was thereafter done at Port Harford, in said State, the "Queen" then having a list of about thirty (30)

degrees to starboard. Upon the vessel being so stranded, she nearly filled with water, and lay in an entirely helpless condition for three or four days. During that time the services of a diver were procured from San Francisco, and he, after repeated efforts, found the leak and stopped it, whereupon the water was pumped out of the vessel and she floated and was towed back to San Francisco. On arrival at San Francisco her cargo was all discharged upon the wharf and delivery thereof there tendered to and accepted by the several owners, they first giving their several general average bonds.

The merchandise, delivery of which was so accepted by Hellman, Haas, & Co., with which we are here especially concerned, was by them delivered to Newhall Sons & Co., auctioneers, for sale at public auction without notice to claimants, and was so sold, for account of Hellman, Haas & Co., on or about the 19th day of May, 1888, and the net proceeds of the sale were paid to that firm, by Newhall Sons & Co., on or about May 28, 1888. The merchandise shipped to domestic coast ports would, ordinarily, be delivered to the consignee, at destination, within five days from the date that it was received from the shipper.

No claim for damage to such merchandise, or to any thereof, was made upon the owners of the "Queen" prior to the sale, nor were the owners of the "Queen" notified of the intended sale. The merchandise so sold—represented by libellants as consisting of rice, nails, tea, drugs, chowchow, pickles, canned vegetables, oil in bottles, sugar in barrels and half barrels, and currants in barrels, 1,551 packages in all—was, so far as appears, all sold as one lot, without examination of the contents of the packages, or any thereof, being made by any one, or an opportunity for such an examination given to the persons attending the sale. The terms of sale were cash upon delivery, and such delivery to be made before dark of the day of sale. The lump sum for

which the goods were so sold was $1,262.20 and the net sum paid to Hellman, Haas & Co. was $1,190.09.

The steamer, after discharging her cargo as aforesaid, was repaired at San Francisco, and thereafter was continuously employed between domestic coast ports, or was lying in San Francisco Bay until she was, under alias process issued in this proceeding on May 4, 1892, seized at said San Francisco on said day; but no claim was made upon her owner, or libel filed against the steamer, for damages in the premises, until the 28th day of April, 1892, four years, lacking two days, from the date that the steamer was stranded at Port Harford, and more than three years and eleven months after the date that the merchandise was so sold for account of Hellman, Haas & Co.

When the libels were filed, or thereafter until the 4th day of May, 1892, the "Queen" was not within the northern district of California (Record, pp. 19–20, and 24).

Each of the libels, after stating that it was "in a cause of contract civil and maritime," and alleging the delivery of the goods to the Pacific Coast Steamship Company for shipment to destination upon the "Queen," and that the same were shipped under a contract of affreightment, in writing, wherein the steamship company "acknowledged to have received said goods *in apparent good order*," and promised to deliver the same, at destination, "in like good order as when received, *certain perils in said agreement mentioned excepted*," and that a copy of said agreement is annexed to the libel "*and made a part hereof*," and that said "Queen" sailed with the goods on board thereof, alleges that "notwithstanding said contract of affreightment * * * said merchandise was not delivered" at destination "or at any other place in like good order as when received, but on the contrary, was returned to said port of San Francisco in a greatly damaged condition, *by reason of having been wet with sea water* during said

voyage, *which by reason of the negligence* of said steamship company, its officers and servants, *gained access to the interior of said ship where said merchandise was stowed*, to wit, on or about the 30th day of April, A. D. 1888. * * * That in consequence of the injury and damage to said merchandise *by sea water* as in the last preceding article herein is mentioned and set forth the *libellants have sustained damages* in the sum of," in the case of Hellman, Haas & Co., $9,015.24, and in the case of the Bancroft-Whitney Co., $455. And further alleged "that said steamship is now within the northern district of California," and the premises within the admiralty and maritime jurisdiction of the Court, to wit, the District Court of the United States for the northern district of California, in which said libels were filed. (See pp. 5 to 14 of Record.)

The bill of lading for the goods of Hellman, Hass & Co.—made a part of the libel with which we are here principally concerned—contained, among other stipulations, the following :

> "Shipped * * * per the Pacific Coast Steamship Company's line of steamers, to be forwarded on the steamer 'Queen' * * * the following property, *in apparent* good order, except as noted, *valued, weight, contents and condition of contents being unknown to said company* * * * to be delivered at the vessel's tackle, in like apparent good order and condition, at the port of San Pedro, unto Hellman, Haas & Co., or assigns, * * * subject to the following conditions, which are made a part of this bill of lading: * * * The company shall not be held responsible or accountable for * * * damage arising from * * * accidents to or from machinery, boilers or steam, *or any other accidents or dangers of the seas, rivers, roadsteads or harbors, or of sail or steam navigation, of what*

nature or kind soever. The company shall not be liable, or accountable, for the hidden contents of packages, *for weight, leakage, breakage,* shrinkage, *rust,* loss or damage resulting from insecurity of packages * * * It is agreed that in the settlement of any claim for loss of or damage to any of the above mentioned goods, *said claim shall be restricted to the cash value of such goods at the port of shipment at the date of shipment.* It is expressly agreed that all claims against the P. C. S. S. Co., or any of the stockholders of said company, for damage to or loss of any of the within merchandise, must be presented to the company within thirty days from date hereof; and that after thirty days from date hereof, no action, suit or proceeding, in any Court of justice, shall be brought against said P. C. S. S. Co., or any of the stockholders thereof, for any damage to or loss of said merchandise; and the lapse of said thirty days shall be deemed a conclusive bar and release of all right to recover against said company, or any of the stockholders thereof, for any such damage or loss."

And said bill of lading had, indorsed thereon, a specification of the packages of merchandise represented by it, and, in addition thereto, the words "*owner's risk.*" (See Bill of Lading, p. 14).

The other contracts of affreightment were, save as to the words "owner's risk," substantially. the same, in their stipulations, as the said bill of lading (see p. 18 of Record).

When the libels were filed—to wit, on the 28th day of April, 1892, a monition was issued thereon and placed in the hands of the marshal for service, by attachment of the "Queen" (Record, pp. 19, 20), and the same was on May 3, 1892, returned not served by reason of not finding the "Queen" within the district (Record, pp. 19, 20).

On May 4, 1892, an alias monition was issued Record, pp. 20, 21), and the "Queen" seized thereunder on that day (Record, p. 21).

Thereafter, and on the 16th day of May, 1892, your petitioner, as claimant of the "Queen," filed exceptions to said libels (see pp. 22, 23 of Record) upon substantially the following grounds:

FIRST. That the libels show that the libelants have no cause of action against and no lien upon the "Queen."

SECOND. That the libels show that the causes of action therein stated, if any, were waived and abandoned by virtue of the special provisions of the several contracts pleaded by libelants, to wit, the thirty (30) day clause thereof, long prior to the date said libels were filed.

THIRD. That said libels show that the demands asserted thereby are stale, neglected and legally abandoned; and are barred by the statutes of limitations of the State of California relating thereto—to wit, Section 337 of the Code of Civil Procedure, which provides a limitation of four (4) years within which to commence an action based upon a breach of an express stipulation of a contract in writing, executed in this State; Subdivision 3 of Section 338 of the same Code, which provides that actions for injuries to personal property must be commenced within three (3) years from the date of the injury; Section 2174, Civil Code, which provides that the obligations of a common carrier may be limited by special contract; Section 2909, Civil Code, which provides that a lien is to be deemed accessory to the act for the performance of which it is a security, and is extinguished in like manner with any other accessory obligation; and Section 2911, Civil Code, which provides that a lien is extinguished by the lapse of time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation. So much of these stat-

utes as is deemed necessary to the decision of this case are as follows:

SECTION 335, CIVIL CODE OF PROCEDURE: The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows: * * *

SEC. 337, C. C. P.: Within four years:

An action upon any contract, obligation or liability, founded upon an instrument in writing executed in this State.

SEC. 338, C. C. P.: Within three years: * * *

3. An action for taking, detaining or injuring any goods or chattels, including actions for the specific recovery of personal property.

SEC. 813, C. C. P.: All steamers, vessels and boats are liable: * * *

5. For non-performance, or malperformance, of any contract for the transportation of persons or property between places within the State, made by their respective owners, masters, agents or consignees;

6. For injuries committed by them to persons or property in this State.

Demands for these several causes constitute liens upon all steamers, vessels and boats, and have priority in their order herein enumerated, and have preference over all other demands; but such liens only continue in force for the period of one year from the time the cause of action accrued.

SEC. 2174, C. C.: The obligations of a common carrier cannot be limited by general notice on his part, but may be limited by special contract.

SEC. 2909, C. C.: A lien is to be deemed accessory to the act for the performance of which it is a security, whether any person is bound for such performance or not, and is extinguishable in like manner with any other accessory obligation.

SEC. 2911, C. C.: A lien is extinguished by the lapse of the time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation.

Further, that the Court had not jurisdiction in the matters alleged, because said steamship "Queen" was not within the territorial jurisdiction of the Court when the libels were filed.

Further, that the lien upon said "Queen" in the premises had expired before the "Queen" was brought within the jurisdiction of the Court, and this by reason of the fact that the causes of action stated in the libels accrued, if at all, on April 30, 1888, and the vessel was not seized by the marshal until May 4, 1892, more than four years after the date of the matters complained of.

Upon hearing had the exceptions were each and all overruled; the Court then finding as a fact that the "Queen" was *not* within the district when the libels were filed (see pp. 24-5, Record).

Thereupon the Pacific Coast Steamship Company filed its answers to said libels, by which it admitted the shipments to have been made under the special contracts relating thereto pleaded by libelants; denied that there had been the negligence alleged in the libels, or any negligence in the premises; admitted that the merchandise was not delivered at the destination stated in said contracts; alleged the misfortune to the "Queen" as hereinabove stated; that the "Queen" was stranded at Port Harford; that such stranding was necessary and was done by the master of the "Queen" as a measure of prudence and in the interest of all concerned in the safety of the ship and the cargo and the persons on board of her, and that the merchandise was wet as the result of such stranding; that the merchandise was all returned to San Francisco on the "Queen," and there delivered to and accepted by the owners thereof, and denied that libelants had suffered damages in the premises to the extent of the sums stated by them, or to any extent, or at all. Alleged that the "Queen" was in all respects seaworthy when she sailed on said voyage; that she was properly provisioned and supplied and was furnished with a competent master

and crew. Further alleged, as a defense, the thirty-day clause of the bill of lading, pleaded by libelants and heretofore set forth, and that no claim had been presented, or suit brought, within such thirty days, or at any time prior to filing the libels herein; that libelants knew of the stranding of the "Queen," and that their merchandise had been wet with sea water as the result thereof, on or prior to the 1st day of May, 1888; that the demands asserted in the libels were barred by Section 337 of the Code of Civil Procedure of the State of California, and by Subdivision 3 of Section 338 of said Code, and by Section 813 of said Code—which latter section provides a limitation for one year for liens upon vessels engaged in carrying goods from one port to another in said State—and by the laches of libellants in prosecuting the same.

Thereafter the cases above referred to—the same being two only out of more than thirty libels filed against the "Queen" on August 28, 1892, and on subsequent dates—came on for hearing before the Court, and it was then admitted that if the "Queen" was liable to Bancroft-Whitney Co. at all she was so liable in the sum of two hundred dollars, and no more. There was no admission relating to the claim of Hellman, Haas & Co.

Counsel for Hellman, Haas & Co., or, more accurately, for The Magdeburg General Insurance Company suing in the names of three of the surviving partners of that firm (see pages 15 and 19 of Record) to maintain its libel, called a witness who testified that Hellman, Haas & Co. knew of the stranding of the "Queen" as early as May 1, 1888, and that subsequent to that date the witness, a member of that firm, had instructed a clerk in its employ to prepare, from copies of invoices in the possession of that firm, a statement of the *cost* of the goods on board the "Queen." That the witness knew

that the statement so prepared was correct, and was for exhibition to an insurance company with which that firm then had an "open policy"; and that the *cost* of the goods to Hellman, Haas & Co., as shown by such statement, was the sum of $10,205.13; that Hellman, Haas & Co. had accepted delivery of the goods, from the "Queen," at San Francisco; and by, another witness, proved that the packages were wet when delivered from the "Queen," and that the nine lots of goods, 1,551 packages in all, were sold at public auction at San Francisco, for account of Hellman Haas & Co., on the 19th day of May, 1888, for the lump sum of $1,262.20, and that the net sum realized by Hellman, Haas & Co. was $1,190.09; and that such auction sale was advertised for two days in one newspaper. That no examination of the contents of the packages was made, and that the terms of sale were cash on delivery, and delivery to be made before dark of the day of sale.

The foregoing was all the evidence introduced by libellants to show the contents of the packages, and the condition of the contents thereof when delivered to the "Queen," and to show the alleged negligence and the extent of the damage to the goods; and on that they rested their case.

Claimant, your petitioner, thereupon moved for a judgment in its favor, which was denied

Thereupon claimant introduced evidence from which the Honorable Judge of the District Court found that the "Queen" was entirely seaworthy when she sailed on the voyage in question, and was properly officered, manned and equipped (Record, pp. 157–164; that there was no evidence indicating negligence of officers or crew in navigating the vessel (Record, pp. 164–5); that water had not been flowing very long into the compartment when the leak was discovered (Record, pp. 165–6); that the testimony rebuts any presumption that a dead light in that compartment could have been

opened by any one on the voyage (Record, p. 166). and that the evidence all tends to show that a dead light in that compartment could not have been open when the "Queen" sailed upon that voyage (Record, pp. 164, 166), and that the water entered the "Queen" through a dead light. The Court further found that the Magdeburg General Insurance Company was the real libellant, and thereupon ordered judgment in favor of libellants, with a reference to a master to ascertain and report the damages sustained (Record, p. 171).

Thereupon the evidence on behalf of libelants, above referred to, was all re-introduced before the Master, and libelants there admitted that no claim for damages to any of the merchandise had ever been made by them until the said libels were filed (Record, pp. 174-5).

Thereupon the Master reported that the *market value* of the said merchandise of Hellman, Hass & Co., at the time of shipment, was the sum of $10,205.13, and that its market value in its damaged condition, when received by libelants at San Francisco, was $1,190.09, the net sum realized from the sale, and that the damage sustained by Hellman, Haas & Co. in the premises was the difference between the two sums—to wit, between the *cost* price and the *sale* price—that is, the sum of $9,015.04 (Record, pp. 175-6).

To that report claimant filed exceptions upon the grounds, among others, that there was no evidence produced before the master which showed, or tended to show, the *cash value* or the *market value* of the merchandise *at the port of shipment at the date of shipment*, or which would support the finding of the master as to its market value on the day it was shipped; and that no evidence had been introduced before the master which supported his finding that the market value of the merchandise in its damaged condition was the value thereof reported by him, and that there was no evidence to support his finding that libellants had suffered

damages in the sum of $9,015.04, or in any other substantial amount (Record, pp. 176–8).

The exceptions were overruled, and a decree as recommended by the master, thereupon entered upon his report (Record, pp. 179, 180).

From that decree an appeal was taken to the Circuit Court of Appeals for the Ninth Circuit, and the same was there heard upon the record as made and upon the evidence introduced in the District Court and before the Master, and upon such hearing the decree of the District Court was affirmed.

Thereupon, and at the same term in which its judgment was rendered, a stay of proceedings was duly obtained from the Court of Appeals to enable your petitioner to present its petition to this Honorable Court for the writ of *certiorari*, which writ was ordered to be issued (Record, pp. 225–6).

Errors Assigned by Appellant.

I.

The order overruling claimant's exceptions to the said several libels, and particularly the following exceptions thereto, to wit: "First exception. For that the said libel and each of said libels shows that libelant and each of said libelants has no cause of action against and no lien upon the said steamer 'Queen of the Pacific,' otherwise called 'Queen,'" was and is, and is here assigned as, error.

II.

The order overruling claimant's exceptions to the said several libels and particularly the following exceptions thereto, to wit: "Third exception. For that the cause and causes of action set forth in said libel and in said libels, each, every and all thereof, is and are in said libel, and in said several libels shown to

have been waived and abandoned by each of said libelants respectively and prior to the filing of the said libel and libels herein under the provisions of a special contract made in that behalf by each of said libelants with the said Pacific Coast Steamship Company, as in said libel alleged," was and is, and is here assigned as error.

III.

The order overruling claimant's exceptions to the said several libels and particularly the following exception thereto—to wit : " Fourth exception. For that said libel and each of said libels shows that the demand and demands asserted therein and thereby is and are and each of them is and all of them are stale neglected and legally abandoned, and are barred by virtue of the laws of the State of California relating thereto, to wit, sections 337 and 338 of the C. C. P., and secs. 2174, 2909 and 2911 of the Civil Code of said State," was and is, and is here assigned as, error.

IV.

The order overruling claimant's exception to said several libels, specified as follows : " And further excepting to said libel and said libels, claimant alleges that this court has not jurisdiction in the matters alleged because said steamship ' Queen of the Pacific,' otherwise called ' Queen,' etc., etc., was not when said libel and said libels were filed in this court, within the northern district of California, or within the jurisdiction of this honorable court," was and is, and is here assigned as, error.

V.

The order overruling claimant's exception to said several libels, specified as follows : " And further excepting to said libel and said libels claimant alleges

that said steamship was not attached by the marshal upon process issued in this proceeding until the 4th day of May, 1892, more than four years after the alleged injury and injuries complained of, prior to which time any lien theretofore existing upon said steamer by reason of any of the matters alleged in said libel and said libels had expired by special contract alleged, and by operation of law," was and is, and is here assigned as, error.

VI.

The Court erred in overruling claimant's objection to the following questions propounded at the trial by proctor for libellants to the witness Abraham Haas, and in admitting in evidence, and considering upon the question of damages, the testimony of said witness, and in refusing to strike out portions of the testimony of that witness when moved thereto by claimant, all as more particularly hereinafter specified—to wit: The witness Abraham Haas, called for libelants, had testified on behalf of libelants, that he was, on the 27th day of April, 1888, a member of the firm of Hellman, Haas & Co., merchants; that that firm was then composed of H. W. Hellman, Jacob Haas, witness, and J. Baruch; that Jacob Haas died in June or July, 1889; that he (witness) was in this city when the steamer 'Queen'" sailed on the voyage in question; that his firm had merchandise on that steamer, consigned to his firm at Los Angeles; that a paper shown witness and marked "merchandise on steamer 'Queen'" was "either the bill or a copy of the bill which we handed to Gutte & Frank for the goods shipped on the "Queen;" when the following questions were propounded to witness by Mr. Andros:

"Q. Do you know what goods were shipped on board of her?

"A. I know by the bills.

"Q. Please to state. Refresh your memory from that paper and state what they were.

"MR. TOWLE: I object to any testimony from that paper.

"MR. ANDROS:

"Q. In whose handwriting is that?

"A. This is in the handwriting of a clerk of ours who was with us then, and who is with us now in Los Angeles.

"THE COURT:

"Q. Do you know anything about that paper yourself?

"A. Nothing more than I told the young man to make it out at the time. He made it under my supervision. * * *

"MR. ANDROS:

"Q. I will ask you to see, as I read this, whether it corresponds with what is on the back of this bill of lading. 50 cases of canned vegetables.

"MR. TOWLE: We object to that as irrelevant, immaterial and incompetent, whether it agrees with the memorandum or not.

"MR. ANDROS: I propose to prove the cost price of these goods by Mr. Haas, and I want to simply indetify these goods by that memorandum so that he may testify as to the cost.

"MR. TOWLE: So far as it has a bearing upon the question of price—if the witness proposes to testify from that memoranda as to prices, we shall object to that. We object to these questions. If the witness is to testify, he can as well testify from the items on the bill of lading as from a memorandum which agrees with those items.

"THE COURT: His memorandum probably has the prices attached.

"MR. ANDROS: Yes, sir.

"Q. 50 cases of canned vegetables; what was the price of this, Mr. Haas?

"MR. TOWLE:

"Q. Are you testifying from your memorandum or from your own knowledge?

"A. I am testifying from the memorandum.

"MR. ANDROS:

"Q. Did you at the time know the cost of these goods?

"A. Yes, sir.

"Q. Did you buy them?

"A. Yes, sir.

"Q. Bought them yourself here?

"A. Either bought them myself or they were bought under my supervision.

"Q. So at that time you did not know what they cost?

"A. Yes, sir.

"Q. Did you subsequently instruct that momorandum of that cost be made?

"A. Yes sir.

"Q. At the time that you made that memorandum yourself, or had it made under your supervision, were the figures therein mentioned the true cost of those goods?

"A. Yes, sir.

"MR. TOWLE: We asked that that answer be stricken out. We object to that as irrelevant, immaterial and incompetent testimony; that the witness cannot prove these values by some figures appearing on a paper. * * * We submit that the only memorandum that can be used is one made by himself at the time. * * *

"THE WITNESS): It was our bookkeeper. * * *

"MR. ANDROS:

"Q. With reference to the time these goods were shipped, when was this memorandum made?

"A. I suppose immediately after the ship went down.

"THE COURT:

"Q. I understood you to say that you knew that the charges there were correct at the time?

"A. Yes, sir.

"Q. At that time?

"A. They were made from the invoices—copy of the invoices.

"MR. TOWLE:

"Q. Mr. Haas, did you compare that memorandum with the invoices after it was handed to you?

"That I am not sure of, but I imagined that I did. * * *

"Q. Hellman, Haas & Co. still exists.

"A. Their successors exist.

"Q. Their books of accounts at that time still exists?

"A. I think they do.

"Q. You know from whom these books were bought?

"A. Yes, sir; they can be dug up if the books and papers are not destroyed. * * *

"MR. TOWLE: We submit that this memorandum is not the best evidence.

"THE COURT: I think it comes within the rule that, where a person knows the correctness of a book, he may refresh his recollection, although the entry may not have been made by him. Motion to strike out denied.

"MR. TOWLE: Save an exception."

And appellant here specifies the ruling of the Court last aforesaid as error.

"MR. ANDROS:

"Q. What was the cost price of the 50 sacks of canned vegetables?

"MR. TOWLE: We object to that question because the answer will be based upon that memorandum which the witness holds in his hand.

"THE COURT: Objection overruled.

"MR. TOWLE: Exception."

And appellant here specifies the ruling of the Court last aforesaid as error.

"A. 100 dozen asparagus * * * $175.

"Q. 250 kegs of nails. * * *

"MR. TOWLE: We object to that question so far as it is based on that memorandum. It is understood that all these questions are objected to, and exceptions saved."

The witness thereupon, in response to questions by Mr. Andros, proceeded to testify from said memorandum that the cost of 250 kegs of nails was $775; 400 sacks of rice, $2,100; 20 packages of tea, $86.40; three barrels of currants, $66.55; 420 mats of rice, $861; 250 barrels of sugar, $4,921.09; 100 half barrels of sugar, $944.39; 10 cases salad oil, $90; 35 cases of pickles, $132.50; and 13 cases of drugs, $63.20.

And appellant here assigns the ruling of said Court, and the admission of the testimony of said witness as to the cost of each and every of the aforementioned items, as error.

VII.

Mr. E. W. Newhall was called as a witness for libelants. On behalf of libelants, he testified that he was in April, 1888, a member of the firm of Newhall Sons & Co., auctioneers; that he remembered that goods were landed from the steamer "Queen of the Pacific" at the sea wall in a damaged condition; that his firm sold such goods at public auction; that he sold some of those goods for Hellman, Haas & Co.; that his firm catalogued and advertised the goods; that he had and produced a catalogue used at the sale.

"MR. ANDROS:

"Q. Are you able to state what goods you sold for Hellman, Haas & Co.?

"A. Identify them by the catalogue?

"Q. Yes, sir.

"MR. TOWLE: We object to that as irrelevant, immaterial and incompetent. Whatever goods he may have sold for Hellman, Haas & Co. is immaterial from any view of this case. * * * It does not tend to show the actual value of the goods; * * * they must prove the damage by some source which goes to the condition.

"THE COURT: Overrule the objection.

"MR. TOWLE: Save an exception."

And appellant here assigns the ruling of the Court last aforesaid as error.

"MR. ANDROS:

"Q. What were the articles that you sold in a damaged condition from the steamer 'Queen of the Pacific' that belonged to, or were marked, 'Hellman, Haas & Co.?'

"A. They were marked 'H., H. & Co.' Are those the ones you want?

"Q. Yes; what were they?

"A. There were 420 mats of rice; 400 sacks of rice; 250 kegs of nails.

"MR. TOWLE: This is all understood to be subject to the objection?

"THE COURT: Yes, sir.

"THE WITNESS: 20 packages of tea; 13 boxes of drugs; 10 cases of chow-chow; 25 cases of pickles; 50 cases of asparagus; 10 cases of Lucca oil; 250 barrels sugar; 100 half barrels sugar; 3 barrels currants. That is all.

"MR. ANDROS: Did you at the time of this sale, or about that time, notice the condition which the packages were in, with reference to being wet?

"A. I don't remember, it is so long ago. The goods were damaged; that I remember very distinctly.

"Q. What did these articles bring; what was the gross sale?

"MR. TOWLE: We object to that as irrelevant, immaterial and incompetent and not tending to prove the damage to the goods.

"THE COURT: Overrule the objection.

"MR. TOWLE: Exception."

And appellant here assigns the ruling of the Court last aforesaid as error.

"A. The gross sales were $1,262.20.

"MR. ANDROS:

"Q. What was the net?

"A. $1,190.09."

Libelants thereupon rested their case.

VIII.

The order overruling and denying the motion of claimant, made when libelants had rested their case, that a nonsuit be granted or that said libels be, severally, dismissed, was error; said motion being made upon the following grounds:

FIRST. That it does not appear that the vessel was within the district at the time the libel was filed, and, therefore, the Court was without jurisdiction of this proceeding at the inception thereof.

SECOND. That this proceeding is based upon contracts, bearing date April 26, April 27, April 28 and April 30, 1898, and which are made a part of the several libels, which contracts provide as follows: "It is expressly agreed that all claims against the P. C. S. S. Co. * * * for damage to or loss of any of the within merchandise, must be presented to the company within thirty days from date hereof; and that after thirty days from date hereof, no action, suit or proceeding, in any court of justice shall be brought against said P. C. S. S. Co. * * *

for any damage to or loss of said merchandise; and the lapse of said thirty days shall be deemed a conclusive bar and release of all right to recover against said company * * * for any damage or loss," and there being no allegation in the libel, and no proof made at the trial, that such claim had been made by libelants, or by either of them, within such thirty days, or at any time prior to the 28th day of April, 1892. And it appearing that libelants severally had knowledge of the condition of their merchandise, and of all the facts necessary to enable libelants to make, and that they were, severally able to make, a full and complete performance of such stipulation of said contracts, at least twenty (20) days prior to the expiration of said thirty days.

THIRD. That there is no proof that claimant, The Pacific Cost Steamship Company, or that the officers or crew of the steamer "Queen," the servants of the steamship company, *or that the officers or crew of the steamer "Queen," the servants of the steamship company,* have been, or were, guilty of any negligence in the premises.

And appellant here assigns the order of the court overruling and denying said motion, as error.

IX.

The Court erred in sustaining the objection of libellants to the following question propounded to the witness Abraham Haas, that is to say:

"MR. TOWLE:

"Q. The merchandise in this case was insured?

"MR. ANDROS: I object to that question as immaterial, incompetent and irrelevant, in every respect. * * *

"THE COURT: I sustain the objection.

"MR. TOWLE: I will take an exception."

And appellant here assigns the ruling of the Court last aforesaid as error.

X.

Mr. A. H. Evans was called as a witness for claimant, and in response to questions by proctor for claimant testified that he was employed by Goodall, Perkins & Co. in the year 1888, and prior to that time, as correspondent and general secretary; that he would open any complaint that might come addressed to Goodall, Perkins & Co., any letters or complaints with reference to the manner in which the business of the Pacific Coast Steamship Company is conducted.

"MR. TOWLE:

"Q. Within your observation has any shipper made any protest against, or by reason of what is known as the clause, or 30-day clause, contained in the shipping receipts in use for that company?

"MR. ANDROS: If your honor please, we object to that as incompetent and immaterial. * * *

"MR. TOWLE: We show that this is the shipping receipt in common use, as appears here. * * * Then we show that no shipper has ever objected to the contract upon that ground that it did not give him a reasonable time within which to present his claims in the event of loss. And we say that that is a circumstance going to show the reasonableness of this contract; that it is in general use and accepted by everybody as furnishing a reasonable time.

"THE COURT: I think, Mr. Towle, that if this were a suit against the Pacific Coast Steamship Company * * * that the evidence would be admissible. But if I remember correctly, I held that this suit was against the steamship 'Queen.' * * * I think I s hall have to rule that the

evidence is not proper here, and sustain the objection.

"MR. TOWLE: We take an exception."

And appellant here assigns the ruling of the Court last aforesaid as error.

XI.

The court erred in its conclusion that this proceeding is not a suit or proceeding against the Pacific Coast Steamship Company, or its stockholders, within the true intent and meaning of the following provisions of the contract alleged in the several libels; to wit:

> "The within goods are shipped and received subject to the following conditions: * * * it is expressly agreed that all claims against the P. C. S. S. Co., or any of the stockholders of said company, for damage to or loss of any of the within merchandise, must be presented to the company within thirty days days from date hereof; and that after thirty days from date hereof, no action, suit or proceeding, in any court of justice, shall be brought against said P. C. S. S. Co. or any of the stockholders thereof, for any damage to or loss of said merchandise; and the lapse of said thirty days shall be deemed a conclusive bar and release of all right to recover against said company, or any of the stockholders thereof, for any such damage or loss."

XII.

The Court erred in its conclusion that claimant was not, and is not, in this proceeding, entitled to the benefit of the sttpulations in its behalf, contained in the contracts in the libels herein alleged.

XIII.

The Court erred in excluding from its consideration and in refusing to claimant the benefit of, the stipulation of the several contracts in the libels herein alleged, reading as follows:

> "The within goods are shipped and received subject to the following conditions: * * * The company shall not be held responsible for any damage or loss resulting from * * * accident to or from machinery, boilers or steam, or any other accident, or dangers of the seas, rivers, roadsteads, harbors or of sail or steam navigation of what nature or kind soever."

XIV.

The Court erred in excluding from its consideration, and in refusing to claimant the benefit of, the stipulation of the several contracts in the libels herein alleged, reading as follows:

> "The within goods are shipped and received subject to the following conditions: * * * It is agreed that, in settlement of any claim for loss of or damage to any of the within-mentioned goods, said claim shall be restricted to the cash value of such goods at the port of shipment at the date of shipment; * * * that all claims against the P. C. S. S. Co. * * * for damage to or loss of any of the within merchandise must be presented to the company within thirty days from date hereof, * * * and the lapse of said thirty days shall be deemed a conclusive bar and release of all right to recover against said company * * * for any such damage or loss."

XV.

The Court erred in rendering judgment in favor of libellants contrary to the following express stipulation of the contracts by them alleged, to wit:

> "The within goods are shipped and received subject to the following conditions: * * * The company shall not be held responsible for any damage or loss resulting from fire at sea or in port, accident to or from machinery, boilers or steam, or any other accident, or dangers of the seas, rivers, roadsteads, harbors, or of sail or steam navigation of what nature or kind soever. * * * It is agreed, that in settlement of any claim for loss of or damage to any of the within-mentioned goods, said claim shall be restricted to the cash value of such goods at the port of shipment at the date of shipment. * * * It is expressly agreed that all claims against the P. C. S. S. Co. or any of the stockholders of said company, for damage to or loss of any of the within merchandise, must be presented to the company within thirty days from date hereof; and that after thirty days from the date hereof, no action, suit or proceeding, in any court of justice, shall be brought against said P. C. S. S. Co. or any of the stockholders thereof, for any damage to or loss of said merchandise; and the lapse of said thirty days shall be deemed a conclusive bar and release of all right to recover against said company, or any of the stockholders thereof for any such damage or loss."

XVI.

The Court erred in its conclusion that the cause of action in the libels herein alleged is for a breach of contract.

XVII.

The Court erred in its conclusion that the cause of action in the several libels herein alleged is not based upon an alleged tort, to wit, upon negligence, as distinguished from a breach of, or a failure to perform, the stipulations of the contract alleged.

XVIII.

The conclusion that the several causes of action in the libels herein alleged were not severally barred by the provisions of Section 337 of the Code of Civil Procedure of the State of California was and is, and is here assigned as, error.

XIX.

The conclusion that the several causes of action in the libels herein alleged were not severally barred by the provisions of Section 338 of the Code of Civil Procedure of the State of California was and is, and is here assigned as, error.

XX.

The finding that libelants, severally, had not been guilty of laches, and the conclusion that the several causes of action in the libels herein alleged were not, severally, barred by laches on the part of libellants, severally, and by such delay in the prosecution of the several suits as constitutes, and is, a bar to a recovery in a court of admiralty, was and is,and is here assigned as, error.

XXI.

The finding and conclusion that the failure of libellants to present their claims for damage to the

Pacific Coast Steamship Company within thirty days from the dates of said several contracts, respectively, had not operated to release, and did not release, to claimant, all their, libellants', rights to recover damages in this proceeding, was and is, and is here assigned as, error.

XXII.

The Court erred in its conclusion that the "negligence of said steamship company, its officers and servants," had contributed to, or had occasioned, the damage to the merchandise, as in said libels alleged.

XXIII.

The Court erred in its conclusion that the damage to said merchandise was not occasioned by a peril of the sea.

XXIV.

The Court erred in its conclusion that the damage to such merchandise was not the result of accident.

XXV.

The Court erred in its conclusion that the negligence of claimant, its officers or servants, occasioned, or contributed to, the damage of said merchandise.

XXVI.

The finding of the Court that an open deadlight on the steamer "Queen" was the occasion of the damage to said merchandise is without any evidence to sustain it, and is contrary to the evidence, and was and is, and is here assigned as, error.

XXVII.

The Court found that the steamer "Queen" was seaworthy when she sailed on the voyage in question, and, further, that the evidence tended to disprove any negligence of officers or crew on the voyage, and then adjudged, upon those facts, that claimant is liable in damages; and such judgment appellant here assigns as error.

XXVIII.

The finding of the Court that the insurance company—Magdeburg General Insurance Company—had paid the loss sustained by the goods shipped by Hellman, Haas & Co. is without evidence to sustain it, and was and is, and is here assigned as, error.

XXIX.

The finding of the Court that the insurance company—Madgeburg General Insurance Company—had become subrogated to the rights of Hellman, Haas & Co. during the lifetime of all the partners, or at all, is without evidence to sustain it, and was and is, and is here assigned as, error.

XXX.

The finding of the Court that this proceeding was and is instituted, prosecuted and maintained, by the insurance company—Madgeburg General Insurance Company—is sustained by the evidence, and the judgment entered herein in favor of the surviving partners of the firm of Hellman, Haas & Co.—to wit, in favor of A. Haas, J. Baruch and H. W. Hellman—is a judgment in favor of persons who are not parties to this proceeding, and was and is, and is here assigned as, error.

XXXI.

The finding of the Court that the Madgeburg General Insurance Company has a right to maintain this proceeding in the names of the surviving partners of the firm of Hellman, Haas & Co.—to wit, in the name of A. Haas, J. Baruch and H. W. Hellman—is without evidence to sustain it, and was and is, and is here assigned as, error.

XXXII.

The interlocutory judgment or decree of the Court entered herein was and is error.

XXXIII.

The order referring the cause to the Commissioner to take testimony concerning, and to report the sum of, the damage to said merchandise, was and is, and is here assigned as, error.

XXXIV.

The ruling of the Commissioner upon the offer of Mr. Andros, and the objection thereto on behalf of claimant, as follows, to wit:

> "Mr. Andros offered in evidence the testimony of Abraham Haas, taken in court upon the hearing of this cause, or so much of it as related to the question of damages, as the same appears on pages 7 to 17, inclusive, of the testimony on file in this cause.
>
> "Mr. Towle: I object to the testimony of Mr. Haas on the question of damages being received, upon the ground that the witness appears to have no knowledge of the market value of the merchandise, the damage to which is in controversy in this

proceeding; and on the further ground that all the statements of the witness relating to the merchandise in question, particularly in relation to any value stated by him of such merchandise, were hearsay and irrelevant, immaterial and incompetent and inadmissible.

"Objection overruled and evidence introduced."

was and is, and is here assigned as, error.

XXXV.

The order and decree of the Court confirming the acts of said Commissioner in the premises, last aforesaid, was and is, and is here assigned as, error.

XXXVI.

The ruling of the Commissioner upon the offer of Mr. Andros, and the objection thereto on behalf of claimant, as follows, to wit:

"Mr. Andros then offered in evidence the testimony of E. W. Newhall, taken in court upon the hearing of this cause, as the same appears on pages 23 to 27, inclusive, of the testimony on file in this cause.

"Mr. Towle: Objected to, first, upon the ground last stated in the previous objection, next upon the ground that it appears from the testimony of this witness that he had no knowledge of the quality or market value of any of the merchandise in question; nor did he have any knowledge of the extent of the damage, if any, which the merchandise sustained at the time to which his testimony refers, nor did he have any knowledge of the market value of the merchandise, or of any thereof, in the condition in which the same was at the time to which his testimony relates. And upon the

further ground that his testimony is irrelevant, incompetent, inadmissible and hearsay.

"Objection overruled, and evidence admitted and introduced. Mr. Andros then rested."

was and is, and is here assigned as error.

XXXVII.

The order and decree of the Court, confirming the acts of said commissioner in the premises last aforesaid, was and is and is here assigned as error.

XXXVIII.

The Court erred in confirming the report of the commissioner, J. S. Manley, in favor of A. Haas and others made and filed herein on the 13th day of September, 1897, and in overruling each of the following exceptions of claimant thereto—to wit:

"First. Because said commissioner hath not, in his said report, found and reported that no damages had been proven to have been sustained by said merchandise, or any thereof, by the evidence produced before him.

"Second. Because said commissioner hath found and reported that the market value of the merchandise referred to in the libel was at, or near to, the time of shipment thereof the sum of $10,203.13, when the evidence presented to him, and reported by him, was not and is not sufficient to show that such sum, or that any material part of such sum, was then the market value, or the then cash value, of the same, or of any thereof.

"Third. Because said commissioner hath found and reported that said merchandise was damaged, and that the market value of the said merchandise

in its damaged condition was the net sum realized at the auction sale thereof of Newhall & Co., amounting to the sum of $1,190.09 only, when the evidence presented to him, or reported by him, was not, and is not, sufficient to sustain such finding and report in any material particular.

" FOURTH. Because the report of said commissioner is based upon what he conceived to be the market value of the said merchandise at the place of shipment, the date of shipment; whereas, by the contract alleged in the libel, it is expressly agreed that, 'in settlement of any claim for loss or damage to any of the within-mentioned goods, said claim shall be restricted to the cash value of such goods at the port of shipment at the date of shipment.'

" FIFTH. Because said commissioner hath found and reported that the amount of damage to said merchandise is the difference between two sums stated by him—to wit, between the sum of $10,205.13 and the sum of $1,190.09; that is, $9,015.14—when there was no evidence presented to said commissioner, or reported by him, which showed, or which tended to show, or which shows, any damage to said merchandise, or to any thereof.

" SIXTH. Because said commissioner hath not found and reported that no damage to said merchandise had been proven by the evidence presented to and reported by him.

" SEVENTH. Because the testimony of Abraham Haas produced before and received and considered by said commissioner was not competent, or relevant, or material, or admissible, to show the cash value or the market value of said merchandise, or of any thereof, and was all secondary and hearsay, and not the best evidence of the market value, or the cash value of the merchandise, either sound or damaged.

"EIGHTH. Because the testimony of Abraham Haas produced before and received and considered by and reported by said commissioner did not, and does not show, or tend to show, the extent or amount of damage, if any, to said merchandise, or to any thereof, and the same, and all thereof, was inadmissible, incompetent, secondary and hearsay.

"NINTH. Because the testimony of E. W. Newhall produced before and received and considered by, and reported by, said commissioner was not and is not competent, or relevant, or material, or admissible, to show the market value of or the cash value of or the damage to said merchandise, or any thereof, at any time, either sound or damaged; and such testimony was not the best evidence to prove damage to, or the value of, such merchandise, either sound or damaged.

"TENTH. Because said Abraham Haas was not a competent witness to testify to any fact relating to value of, or to damage to, said merchandise, or any thereof.

"ELEVENTH. Because said E. W. Newhall was not a competent witness to testify to any fact relating to the value of, or to the damage to, said merchandise, or any thereof.

"TWELFTH. Because said commissioner hath found and reported that damages in the sum of $9,015.04 had been sustained by Hellman, Haas & Co., when there is no evidence reported by him to sustain such finding and report.

"THIRTEENTH. Because said commisaioner hath not found and reported in favor of claimant—that is, that no claim for damage has been sustained upon the stipulation of the contract set forth in the libel, as follows: 'It is expressly agreed that all claims against the P. C. S. S. Co. * * * for damage to, or loss of, any of the within merchandise must be presented to the company within

thirty days from date hereof, * * * and the lapse of said thirty days shall be deemed a conclusive bar and release of all right to recover against said company * * * for any such damage or loss.' "

XXXIX.

The Court erred in confirming the report of the Commissioner J. S. Manley in favor of Bancroft-Whitney Co., a corporation, made and filed herein on the 13th day of September, 1897, and in overruling each of the following exceptions of claimant thereto, to wit:

"FIRST. Because said commissioner hath found and reported that damages in the sum of $200 have been sustained by Bancroft-Whitney Co.

"SECOND. Because said commissioner hath not found and reported in favor of claimant—that is, that no claim for damage has been sustained, upon the stipulation of the contract set forth in the libel, as follows: 'It is expressly agreed that all claims against the P. C. S. S. Co. * * * for damage to or loss of any of the within merchandise must be presented to the Company within thirty days from date hereof, * * * and the lapse of said thirty days shall be deemed a conclusive bar and release of all right to recover against said company * * * for any such damage or loss.' "

XL.

The Commissioner J. S. Manley erred in receiving in evidence, over the objection of claimant interposed thereto, as specified in his report filed herein on the 13th day of September, 1897, the testimony of Abraham Haas as to the cost of said goods, as showing or tending to show the "cash value" of such goods at the

port of shipment at the date of shipment, and in considering such evidence and in finding thereon that the market value of the goods was the sum testified to by said Abraham Haas.

XLI.

The Court erred in confirming the ruling, and the finding of the Commissioner J. S. Manley in the particulars last aforesaid.

XLII.

The Commissioner, J. S. Manley, erred in receiving in evidence, over the objection of claimant interposed thereto, as specified in his report filed herein on the 13th day of September, 1897, the testimony of F. W. Newhall, relating to the sale by him of said goods of A. Haas and others, as showing, or tending to show, the extent of the damage to said goods, and in considering such evidence and in finding thereon that the value of the said goods, in their then condition, was the net sum realized from their sale as testified by said Newhall.

XLIII.

The Court erred in confirming the ruling, and the finding, of the Commissioner, J. S. Manley, in the particulars last aforesaid.

XLIV.

The finding and report of said Commissioner J. S. Manley, that the market value of the merchandise of A. Haas and others, or of Hellman, Haas & Co., was the sum of $10,205.13 was and is immaterial and outside the issues in the libel of said A. Haas and others tendered, and is error; and the consideration of said finding and report by the Court, and its judgment in

favor of said A. Haas and others, based thereon, was and is, and is here assigned as error.

XLV.

The finding and report of the Commissioner J. S. Manley, that the damage to said goods of A. Haas and others—Hellman, Haas & Co.—was the differerence between the market value of the same as found and reported by him, and the price realized from their sale at auction, as testified by E. W. Newhall, and found by said Commissioner, and that the damage to said goods was the difference between those sums, and that claimant, or the steamer "Queen," is liable in damages to said A. Haas and others in the sum of such difference, was and is error, in view of the stipulation of the contract "that, in settlement of any claim for loss or damage to any of the within goods, said claim shall be restricted to the cash value of such goods at the port of shipment at the date of shipment."

And appellant here assigns such finding last aforesaid as error.

XLVI.

The Court thereafter, and over the exception of claimant thereto, confirmed the finding of said Commissioner last aforesaid.

And appellant here assigns the confirmation thereof by the Court as error.

XLVII.

The Court erred in rendering and entering a final decree herein in favor of A. Haas and others in the sum of $9,044.84, and costs to be taxed, or in any sum.

XLVIII.

The Court erred in rendering and entering a final decree herein in favor of Bancroft-Whitney Co. in the sum of $200.66, and costs to be taxed, or in any sum.

XLIX.

The Court erred in adjudging that said decree in favor of A. Haas and others should bear interest.

L.

The Court erred in adjudging that said decree in favor of Bancroft-Whitney Company should bear interest.

Wherefore, appellant prays the judgment of the United States Circuit Court of Appeals for the Ninth Circuit in the premises, that the decrees appealed from be reversed, and that it recover its costs herein incurred.

FIRST.

Jurisdiction.

The first question which comes up in this case is the question of jurisdiction—the question whether the suit was properly commenced. On this the facts are as follows:

On the 28th of April, 1892, the libel was filed with the clerk. By the 23d Rule of Admirality made by the Supreme Court, pursuant to law, and therefore having the force of a statute, the libellant was obliged to state what he did state in Article IV. of his libel, viz:

"IV. That said steamship is now in the Northern District of California." We shall waste no time in arguing that the Supreme Court rule will not be satisfied by this assertion, unless it is true. To insert into the rule the words "whether true or false" hardly seems a creditable contention. There being such an asservation required and it also being required that that asservation shall be true it becomes fundamental to know whether it was true or not.

That it was not true is one of the facts of this case. This is shown by two returns of the Marshal. The first return, dated May 3, 1892, is as follows (Record, p. 20):

> "After due and diligent search, I was unable to find the steamer 'Queen of the Pacific,' otherwise called 'Queen,' in my district. I return the monition unexecuted.
>
> "Dated May 3d, 1892.
>
> "W. G. LONG,
> "U. S. Marshal.
> "By A. L. FARISH,
> "Deputy Marshal."

On the 4th of May and on an alias monition the ship was seized.

So clear was the case that the Court on the motion to dismiss—on which we think we were entitled to prevail—passed upon the fact in these words (Record, p. 25):

> "The 'Queen of the Pacific,' at the time the libel was filed, was not within the Northern District of California, having departed therefrom some few hours previously. The monition was consequently returned not served."

Whereupon the learned Judge decides that:

> "The objection that the vessel was not within the jurisdiction of the Court when the libel was

> filed is immaterial. Rule 23 of the General Admiralty Rules, prescribed by the Supreme Court, provides that: 'All libels in instance causes, civil or maritime, shall state the nature of the cause, * * * and if the libel is *in rem* that the property is within the district.' The libel in this case contains such an allegation, and, for the present purpose, it must be assumed to be true."

We are at a loss to understand what these observations are intended to cover or to indicate. A fact which the rules of court, having the force of statutes, require to be stated can hardly be immaterial in the sense that it does not matter whether made or not made; nor can the Court mean to say that a false allegation just as well satisfies a rule of Court as a true one.

If it is meant that the jurisdiction over the subject arises from a general jurisdiction, and is inchoate until materialized by seizure in the district, the answer at this time would seem to be that while the Constitution gives Admiralty jurisdiction generally, the law under the Constitution confines it to ships in the district. If the ship is not in the district, there is, in that case, no admiralty jurisdiction.

To give admiralty jurisdiction, two things must concur; an admiralty court and the presence of the *res* in the district. If either fails to exist, there can be no jurisdiction. The presence of the *res* could not give jurisdiction to a state court, nor could the capacity to take jurisdiction on the happening of an event which did not happen, become the equivalent of jurisdiction in an admiralty court. The Circuit Court Judges claim jurisdiction on another ground. They say that because the United States Court sometimes refrains from issuing process and seizing in admiralty a *res* in the district and already in possession of the state courts, and still maintains jurisdiction, this justifies the taking of a jurisdiction dependent upon the possibility of an

event—the presence of the *res* in the district—an event which has not happened and may not happen. Such does not seem to be the status of the cases cited. In those cases all the requisites for jurisdiction exist, the Court capable of taking it and the presence of the *res* which is essntial to confer it. The Court may then be very properly said to have jurisdiction and refrain on well-known and peculiar grounds frmo seizing. The case now before us is a widely different case. The Court, with capacity to take jurisdiction, exists and can take jurisdiction, but not when the *res* is not in the district. It has the potentiality of jurisdiction, not jurisdiction. If the Court will pardon a homely statement, an egg basket is not a basket of eggs because it has a capacity to hold eggs.

By making Rule 23 this Court seems to have already passed on the question now before it. If the allegation in paragraph IV. had not been made the libel could not have been filed ; or, if filed, must have been dismissed.

Can the libellant be better off by stating what was false than by stating what was true?

If it be said that when the seizure took place it related back and cured the fault in the libel, let us put that idea into practical connection with these facts. Instead of the words of paragraph IV. of the libel let us say :

> "IV. That said steamship is not now in the Northern District of California but is expected here, and we intend to seize her at once."

Would this have been sufficient? If the fact as it really existed could not set the machinery of justice in motion, will a false statement do it?

This fact of a suit commenced on a false foundation, runs through the whole case and cannot be got rid of.

On this branch of it we contend that the proceedings should be dismissed. They were commenced by a

disobedience of the rule of the Court, and have been continued as if no such rule existed.

When the suit came up before the District Judge on exceptions, he found the fact unequivocally and should have given us the legal results which flow from that fact, and the suit might then have been properly commenced. Our exceptions were filed on May 16th, 1892.

It should be said in addition that the proof of facts have not changed by any evidence since presented, but rests upon the finding of the Judge cited above. Later (May 12, 1896), Judge MORROW, in his opinion (Record, p. 76) says:

> "There is testimony tending to establish the fact that the steamship was within the jurisdiction of the court when the libel was filed."

Where? In the record (p. 68), where Mr. Andros says he was "informed"—not, however, by anybody whose name was mentioned. Of course, no testimony was there admitted, except what was legal.

Indefinite hearsay as it was, it was not stated until 1896, four years after the event. Mr. Andros' "statement" is a most exhaustive statement of the absence of evidence.

Neither Court undertakes to say that the finding of Judge MORROW, when the facts were fresh, was in any way wrong.

The only argument made by the Circuit Judge is *in extenso* as follows:

> "There are numerous cases where the process in *rem* has been issued by a Federal Court where the *res* was within the hands of a State Court of co-ordinate jurisdiction. In such cases the Federal Court refused to dismiss the libel, but postponed action thereon until the proceedings in such Court of co-ordinate jurisdiction were terminated.
>
> "The E. L. Cain, 45 Fed., 367.
> "Morgan v. Sturgis, 154 U. S., 256, 279.
> "*In re* Chetwood, 165 U. S., 443, 460.
> "*In re* Johnson, 167 U. S., 120, 125.

> "It must be admitted that in such cases the *res* is as much without the jurisdiction of the Federal Court as if it were without the district."

What the Court here says "must be admitted" seems to us the very point to be argued. It is true that Mr. Justice MATTHEWS (Covell vs. Hyman, 111 U. S., 182) says: That in a case where one court already has possession "the *res* is as much withdrawn from the judicial power of the other as if it were carried physically into a different territorial sovereignty." But this does not need to be taken literally. In fact it cannot be so taken. Even in the case of "The E. L. Cain" (45 Fed. Rep., 367, 369) where this is cited as the foundation for refusal to act, the Court says: "*But* the liens set up are maratime liens, which cannot be adjudicated or passed upon by the State Courts. * * * Let the causes be retained" until the State Court has disposed of its part of the remedy.

Surely if the *res* had been carried physically into a different territorial sovereignty and was there when the libel was filed, would any one say that the causes could have been retained? The truth is, in that expression the Courts were only stating strongly a proposition which was true without excepting to be bound by such a comparison in all the possible limitations which would exist when other relations were brought to mind. Indeed, such is the character of our race that even the Court must sometimes use rhetoric to get an idea into our heads without being expected to redeem an expression as if it were an order for just so many dollars.

In the case of The Silver Prince (1 Ben., 234), cited and approved in Moran vs. Sturges (154 U. S., 256), the Court took jurisdiction over freight money in the hands of a Sheriff on a libel for wages, thus showing, as all the cases do, that through this comity of courts no prior rights are to be sacrificed.

These cases, while they show that as a matter of policy and comity between State and Federal Courts the first in possession are to be the first in action, yet such action in no way justifies the idea that the suspension of a jurisdiction, to be exercised later, is the same as the absence of a jurisdiction. Nor can language used only to convey the idea directly before the Court be so wrested as to support an idea essentiallydifferent and not the least in mind.

Miller vs. U. S., 11 Wallace, 268, 294. and
Brenner vs. Steam Tug, 4 Fed. Rep., 459,

go even further and decide that the seizure is necessary to confer jurisdiction.

In Toland vs. Sprague, 12 Peters, 300;
The Lindrup, 20 Fed. Rep., 718, and
Pinknew vs. Hungaria, 41 Fed. Rep., 109
(same case sustained 42 Fed. Rep., 510),

the Courts decide that seizure must be made within the district.

The L. X. B. (88 Fed. Rep., 290–296) was a case where a motion was made to dismiss a libel in a case where the *res* was not in the district and the libel was dismissed.

No question was ever raised as to method of procedure in determining this contention. It was decided on its merits, without objection on the part of Court or counsel. There has never been any suggestion that we did not properly raise the question.

Another aspect of this question of the acquisition of jurisdiction we will discuss later on when we come to the defenses arising out of the Statutes of Limitation.

SECOND.

The Thirty Days Conditions in the Contract.

The next questions discussed by the Circuit Court are, first, the question of the presentation of claim of loss within the thirty days limited by the contract, and, second, the question of the limitation of time for bringing suit. These two provisions of the contract are set out by the libel as part of the libellant's case, and it is contended that he cannot gainsay what he has so alleged. Had he chosen to declare on the rest of the contract, leaving us to set that up as a defense, it would leave the cause of action as passed upon by the Court. The Court refused to take our view as too technical for an objection to an admiralty pleading, and allowed the clauses to be attacked.

If those clauses, or either of them, were to be held good, it would be fatal to the case; for there is no pretense that either of them was complied with.

That compliance with each of them, if valid, was a condition precedent to enable the libellant to recover, the following cases seem to show:

Cal. S. B. of S. D. vs. Am. Surety Co., 87 Fed Rep., 118-120.
Albers vs. Western Union, 66 N. W., 1040.
Angel vs. Cunard Co., 55 Fed Rep., 1005.
Moore vs. Harris, P. C. 34; Law Times, N. S., 519.

See, also,

Sherwood vs. Ins. Co., 10 Hun, 593.
Ostrander on Insurance, Section 221.

The Court, however, held:

First, that the contract did not apply, because being made with the owners of the vessel it only protected them, leaving the maritime lien the action involving the *res* utterly unaffected by the writing between the

parties, at least so far as these clauses are concerned. This was done upon the ground that as the language only affected them and did not mention the steamer, it was to be taken most strongly against them, and was confined to actions against them, and did not apply to a claim on the ship.

Second, the Court also decided that both requirements were unreasonable and void even if the *res* could have the benefit of them.

On the first proposition the Court assumes that goods can be received under a contract with owners and that the goods can have the ship not as security for the fulfillment of the contract under which they were received, but as security for the fulfillment of a different contract. It further assumes that the conditions made with the ship owner for the use of the ship (conditions made by contract) will protect the ship owner and not the ship owner's property, the use of which is the subject of the contract. All the other property of the ship owner may be protected by this contract, but not the property the use of which is by the contract stipulated for.

Certainly, some authority ought to be found to sustain this novel idea. But the only authorities cited are those which say that a contract must be construed most strongly *contra preferentes*. But construing a contract most strongly against those who set it up has nothing to do with this idea. That applies to doubtful contracts. Does anybody imagine that the Pacific Coast Steamship Company meant by elaborate conditions to protect its other property and leave the ship, the use of which was the subject of the contract, to any other and different line of liabilities? On the other hand, does anybody imagine that the shippers of goods had any idea that they had two different contracts?

Such a construction is negatived by the rest of the opinion of the Court for the Court assumes that other conditions are applicable to this case though the condi-

tions referred to are stipulated as for the "Company" (see Record, p. 9, lines 3 to 17). The very restrictions of "damages of the seas and accident" are included in just such terms. "The *Company* shall not be held responsible * * * for damages of the seas," etc. In a word, if this idea of the Court be tenable, we were common carriers with absolutely no limiting conditions as to our liabilities (Record, p. 8—last paragraph).

No cases whatever have been cited showing the ship to have been bound by any other contract than by the one which bound the owners. Such, certainly, is not the language of other judges. Mr. Justice CURTIS in Freeman vs. Buckingham (18 How., 103) approving "The Druid" (1 Wm. Rob, 399), says:

> "I apprehend that no suit could ever be maintained against the ship where the owners were not themselves personally liable or where their personal liability had been given up, as in borrowing bonds by taking a lien on the vessel. The liability of the ship and the responsibility of the owners in such cases are convertible terms; the ship is not liable if the owners are not responsible, and, *vice versa*, no responsibility can be attached to the owner if the ship is exempt and not liable to be proceeded against."
>
> See, also, the Bold Buccleugh 2 Eng., L.E., 437.

In The Kensington (94 Fed. Rep., 885, 888) this very point was made and was disposed of as follows:

> "The proposition contended for, that the clause in question provides only for the relief of the 'shipowner or agent,' and does not inure to the benefit of the ship itself, which in this case is called upon to respond only because it is alleged the owner did not carry out its contract, seems to be without merit."

This case was decided May 25, 1899.

If our contention on this point be correct the Court below has already decided itself in error in rejecting proof that no objection was ever made by any interested party to the thirty-day clauses (see Error No. 10).

The question of the thirty days' requirement if applicable to this suit, remains to be discussed. This provision was double, or, rather, there were two provisions: first, that any claim should be presented within thirty days, and second, that suit should be begun within thirty days. As to both of these contentions, it is to be said that there is enough in the case to show that both of these conditions were part of the regular contracts entered into between the company and its customers, and the presumptions are, therefore, all in favor of the binding force. They were part of the contract of the parties, and, moreover, they were made part of the libellants' claim. Had they been omitted from the libel and pleaded in defense, the aspect of the case would have been somewhat different. Can a party be heard in contravention of his own allegation?

However that may be, the contract condition is not to be disposed of out of its own atmosphere. This was a contract to be fulfilled in the State of California. The ship was plying between California ports, and so made its voyages that ordinarily in five days the goods would be delivered.

On the question of reasonableness there is not only the consent of those interested in the particular case, together with the averment in the libel, but also the general consent of the trade which we offered to prove.

These are days of telegraphs and telephones and rapid communication, and also rapid closing up of business. It is for the interest of all that speedy action should be had.

There is no limitation which could be made which might not be at the mercy of some imaginable accident. If, on the whole, it was one which in the great bulk of cases both parties could live up to, that is

enough to prevent the Court from using the harsh remedy of breaking the contract the parties have made. We are well aware of the claim that carriers have an advantageous position which they should not be allowed to abuse. But it is gradually being understood that the lessening of their burdens means in the long run the lessening of rates of freight.

In insurance cases notice within five and ten days is deemed reasonable.

In Angel vs. Cunard Co. (55 Fed. Rep., 1005-6) BENEDICT, D. J. (1893) held reasonable "a notice to be given before the removal of the goods." "This provision," he says, "seems a reasonable one in a bill of lading."

If it is to be held reasonable that the claim must be made before the removal of the goods, can it be unreasonable that the claims should be required to be presented within thirty days after the making of a contract to be performed in five days, especially when the parties both made the contract without protest?

Skinner vs. R. I. (12 Iowa, 191).

Moore vs. Harris, P. C., 34 Law Times, 519, cited in Angel vs. Cunard Co. *(supra)*, where condition was no claim for damage paid for "unless made before goods removed."

All this reasoning applies to both conditions, but it is, of course, much stronger as to the condition for the presentation of the claim within thirty days, although the Courts below make no distinction apparently. Even if the thirty-days limitation on the suit is near the "unreasonable" line, it does not follow that the filing of a claim is an unreasonable requirement under all the circumstances.

The case of Pacific Express Co. vs. Darnell (6 S. W., 765, 766; 1887), cited by the Court, does not justify the reliance of the Court. That was a case where the express company had itself detained for fourteen days the mill machine which was to be sent to Baltimore from Texas to be repaired. The company had full

notice that the mill was stopped awaiting the return of the machine. The elements of unreasonableness are far from being the same in that case as in this.

Statutes of Limitation.

The next question to be considered is the effect of the Statutes of Limitations.

The statutes appealed to are the Statutes of the State of California, containing paragraphs (three in number), all of which, we contend, may be applicable, and one of them must be, whether we can come under its terms or not.

The first is Section 813 of the Code of Civil Procedure of the State of California, and, so far as material, reads as follows :

> " All steamers * * * are liable * * *
> 5. For non-performance and malperformance of any contract for transportation * * * between places within this State made by their respective owners, masters, agents or consignees.
> 6. For injuries committed by them to property in this State.
> Demands for these several causes constitute liens upon all steamers * * * such liens only continue in force for the period of one year from the time the cause of action accrued."

The second section appealed to is Section 335 of the Code of Civil Procedure, and reads as follows :

> " SECTION 335. The periods prescribed for the commencement of actions other than for the recovery of real property are as follows :
> " SECTION 336. * * *
> " SECTION 337. * * *
> " SECTION 338. Within three years :

"1. * * *
"2. * * *
"3. An action for taking, detaining or injuring any goods or chattels."

Section 28 of the same Code reads:

"An injury to property consists in depriving the owner of the benefit of it, which is done by * * * deteriorating or destroying it."

The third section, to which we appeal, is:

"SECTION 337. Within four years, an action upon any contract, obligation or liability founded upon an instrument in writing executed in this State."

There are some general observations, both as to the facts and as to the law, which are applicable to all three of the claims here made. *As to the facts*:

It will be seen that this was a contract made and to be performed in the State of California by and and between inhabitants of California; that the shippers were doing business in the State; that the alleged injury, and indeed the whole transaction, took place in the State. There would, therefore, seem to be the best of reasons why the laws of the State should prevail in the settlement of this controversy.

We ought also to call the attention of the Court to the fact apparent in the case that even if we admit that we have lost no testimony as to the disaster to the steamer it is quite equally apparent that we have lost all opportunity to show the nature of the damage to the merchandise, and the libellants have lost all power to legally prove it. Equity, therefore, requires the enforcement of the limitation laws.

As to the law we say:

Statutes of Limitations, when they were first enacted, were received with some disfavor, both by individuals and by the Courts. But now everybody has

become reconciled to them, and it is felt to be a necessity for the transaction of business that they should be properly enforced. So far as all questions in the United States Courts depending upon the common law form of action is concerned, it seems to be settled beyond peradventure that the law of the State governs the limitation of the time within which suit may be brought. This has been held to apply even to a case where the suit brought in the United States Court was a patent suit and could be brought nowhere else. At first, the Courts of Equity and of maritime jurisdiction took the ground that they were not bound by the Statutes of Limitation of the State where the transaction or the trial took place, and there was a very strong disposition to retain the power to make limitations as the Court should itself determine in each case. We do not say that that contention has been abandoned, but we do say that it has been so changed that the foundation on which the whole matter really rests has been more thoroughly recognized by the Courts.

A statute of limitations is an expression on the part of the community as to the way in which business should be conducted. It most deeply concerns the interests of all that there should be an end of the possibilities of litigation. What would be a just period after which suit would be incapable of commencement is a matter which enters so thoroughly into tho business of a community that they can be safely trusted with the establishment of laws to govern that question; and the courts have been more and more every year inclined to follow these expressions of opinion on the part of the States. This is true of United States Courts, where they were originally deemed not to be particularly applicable; and both Congress and the courts, in all common law cases, have determined that the statute of the State in similar case should be followed, even where the analogy is not perfect. In equity, the proceedings are so different in the different States that some doubt has been raised as to the language proper

to be used to express the opinions of the United States equity courts; but in substance the State statutes of limitations are followed about as sedulously as they are in the common law actions. In admiralty, there is no exact resemblance between any proceeding on the part of the State and the proceedings in the admiralty courts. Nevertheless, the same principle prevails that the admiralty courts will come as near as may be to obeying the will of the community in which the court is held, and over the business of which it is exercising jurisdiction.

What has especially prepared the way for this increased readiness on the part of the admiralty courts to follow the State laws has been the establishment of maritime liens by the states outside of the admiralty jurisdiction conferred by the Constitution and by Congress. While the State courts themselves have no right to enforce these maritime liens, the courts of the United States have undertaken to enforce them, and, moreover, to enforce them with reference to the Statutes of Limitation, which were annexed to the establishment of the right. It is admitted in all cases that, where the State has given a lien which had not hitherto been under the jurisdiction of the United States courts of admiralty, the limitation as to the existence of the lien has been recognized also.

To illustrate what is meant by the gradual change of opinon as to the effect of limitation laws on admiralty suits, the expression of Mr. Circuit Justice WALLACE may be taken as an indication. This will be found in Miles vs. Vivian (79 Fed. Rep., 848), decided April 8, 1897, where the doctrine is laid down in much broader terms than in the earlier cases, indicating a growth in the direction of the recognition, more fully and completely, of the obligatory force of the Statutes of Limitation. Judge WALLACE says (p. 852):

> "Statutes of Limitation are equally obligatory upon the courts of equity and courts of law in cases where the jurisdiction is concurrent. In

> such cases, courts of equity do not act so much *in analogy to the statutes as in obedience to them* (2 Story, Eq. Jur., 13 Ed., 842.) Although the ordinary chancery jurisdiction (like the admiralty jurisdiction) of the Courts of the United States cannot be abridged by state statutes, they recognize those of the state in which the court is sitting, limiting the time for bringing suits, and adopt them, if they do not act in obedience to them."

It will be noticed in very many, possibly in all the cases where the matter arose in that form, that the courts have applied the principles of the statute of limitations of the state even in cases where the form of action was different and where the analogy was by no means exact.

In Cockerill vs. Butler (78 Fed. Rep., 679), decided February 15, 1897, the one-year Statute of Limitations of Arkansas of actions on the case was to be applied to an equity suit against the directors of a United States bank. This case also cites Heddon vs. Thompson (71 Fed. Rep., 60), where the Circuit Judge (SANBORN) says:

> " If the analogous action at law against the defendant would be barred by the Statute of Limitations of Nebraska, this suit must be dismissed as against him."

The principle which underlies this case and the other cases seems to be this: That where the will of the citizens of the State has been expressed so that it will apply, although not exactly, to proceedings in United States Courts, the analogy is to be followed, or the Court will act in obedience to that expression.

This does not, under our system of laws, and under what Chief-Justice MARSHALL called "the genius of our laws," seem to be unreasonable. While we are a

homogeneous people, constituting a nation, nevertheless we have so constituted that nation that the differences arising from geographical situation, from distance and from all those things that go to make up local sentiment and feeling and action, find expression in the local laws; and justice can be done in the different communities only by a careful observance of those laws. A Statute of Limitations of six years in New England might be entirely reasonable, while in California a statute of one year might be equally reasonable, and if the two statutes were reversed as to locality they might both work injustice. If the New England statute gives too much time, that can be easily corrected, and if the California statute is too short, California also has its local means of correction. All such statutes are the outgrowth of the business conditions of the different parts of the Union, and, while it seems to create a great deal of confusion to one who takes a bird'seye view of the whole number of States, it creates no perplexity or trouble in each particular State.

These general considerations are applicable to all three of the propositions which we present to the consideration of the Court.

The first section which limits the lien to a year, is either the creation of a new lien, or it is the recognition of an old one. Probably, it does not enlarge the lien which existed under the established admiralty jurisdiction of the United States. Probably, it simply recognizes an old lien which has always existed under the admiralty jurisdiction of the courts of the United States. If it were a new lien, there is no doubt that the one year Statute of Limitations would be applicable to this case. Courts have decided that State liens, created by State Courts, are to be treated in precisely the same way as all other maritime liens, founded either upon the constitutional grant of jurisdiction or upon the wording of statutes, and these are marshalled according to the same principles, having no

fewer and no greater rights than the old original maritime liens. They are, however, governed by the Statute of Limitation embodied in the statute which creates them.

Now, the Admiralty Court proceeds, if not in obedience to the laws of the States, certainly in analogy and in deference to them; and it is admitted in these cases, by all the decisions which have been made by the Court therein that some Statute of Limitations controls. Whether it it controls by analogy or by its own force, the reasoning would seem to be that the limitation made should be that which the statutes of the State contemplated in similar cases. In recognizing the lien which already exists, the State of California, so far as transactions with regard to her own ports are concerned, has decided that statutes of limitations, or what may be called substantially statutes of limitations, shall be created of one year. Why should not the Court of the United States recognize the statute of California in such case as this, as well as recognize the statute of the State applying to actions on the case, and compare it with a suit in equity brought against the officers of a United States bank, as in the case of Cockerill vs. Butler cited above? In other words, why should the Court recognize the analogy between either of the two subsequent sections which have been quoted on account of its resemblance to the case in hand when a statute has been passed by the State to meet the very case in question? In still other words, can the State impress upon the United States Court an analogy which is complete and perfect as well as analogies which are not complete and not perfect? Can they limit the remedy directly or must they limit it indirectly?

At first there was a disposition to make the new liens created by the State statute inferior to the old system under the Constitution, when of the same character, but perhaps now it may be said that following the lead of Mr. Justice MATTHEWS in the

Guiding Star (18 Fed. Rep., 266), BROWN, J., in The Amos D. Carvel (35 Fed. Rep., 666), is right when he says: "All" (that is, all statutory and maritime liens) "are treated in this district as on the same footing."

The same Judge predicted this result in 1884 in the J. W. Tucker (20 Fed. Rep., 129, 134).

See also,

The Arctic, 22 Fed. Rep., 126–129;
The Sylvan Stream, 35 Fed. Rep., 314, 315,

where the cases are collected.

The Wyoming, 35 Fed. Rep., 548.
The Venture, 26 Fed. Rep., 285.
The Menonomie, 36 Fed. Rep., 197.
The Edith, 94 U. S., 379.
Clyde vs. Steam Transport Co., 36 Fed. Rep., 501.
The Madrid, 40 Fed. Rep., 677,

where Mr. Justice LAMAR stated the same general doctrine at length.

See, also, Brine vs. Ins. Co., 96 U. S., 629–634.

In Campbell vs. The City of Haverhill, 155 U. S., 610, it was shown that a Statute of Limitations was originally made in patent causes and was afterwards repealed. Notwithstanding this, the State statute was held applicable, because Section 721 of the Revised Statutes provides that "the laws of the several states * * * shall be regarded as rules of decision in trials at common law in Courts of the United States in cases where they apply." There are no such things as patent suits to be brought in the State Courts, and yet the analogy of the State law governed.

Equity and admiralty cases are not controlled by this statute, § 721, but are controlled by the same principle, which is, that while no State statute can curtail an admiralty or equity right, it may control the remedy. While it may be contended that many cases, notably the Key City, 14 Wall., 653, prefer to keep

control of equity and admiralty matters, in order that justice may be in complicated cases, still even those cases regard the limitation as *prima facie* good and throw on those who desire to escape it the burden of showing such facts as will justify taking the case out of the statute. In this case there are no facts justifying an extension.

The second Statute of Limitations to which we appeal prescribes the period for the commencement of actions "other than for the recovery of real property," and provides that the right to bring such an action is to cease within three years. An action for taking, detaining or injuring any goods or chattels must be commenced within three years. By way of definition as to what injury of goods or chattels means, Section 28 of the Code provides: "An injury to property consists in depriving the owner of the benefit of it, which is done by deteriorating or destroying it." Whether this provision is applicable to this case, or whether the third provision cited is applicable, is a matter which is in contention between the parties. On behalf of the libellants it is said that this is an action upon contract and therefore not within the provisions of the section which has just been cited. On our side it is contended that this cannot be an action on contract, because, if it were, it would be an action for not delivering, in good order and condition, the goods which had been received.

We think a good deal of the confusion in this case has arisen from the fact that the courts below have all throughout the case omitted to notice the distinction between the contract which was actually made and the contract which is alluded to in the cases which they cite as a justification for that conclusion.

In earlier times, the receipt which was given by a shipmaster or ship's agent was that the goods were in "good order and condition." In this case, the words on the contract are "in apparent good order, except as noted, value, weight, contents and condition of contents being unknown to said company."

Upon the first-named contract there would be no obligation on the part of the shipper to show that his goods were in good order and condition. Having receipted for the goods by the use of the words "in good order and condition," the common carrier would then have the burden upon him to show the contract fulfilled. Under the form of contract actually made in this case the shippers were under obligation to show that the goods which they put on board were actually in good condition. They have offered none. They rest not on the contract, but on the tort. Under the first form of contract the procedure was very simple. The shippers offered no proof except the bill of lading to show that their merchandise was in good condition, but presented proof of the damaged condition of the merchandise, and the burden of proof to show that it was injured by something which by the conditions in the agreement itself exempted the "Carrier," and if they failed to show that it came within the exceptions of the contract they were liable.

Both the Courts below, throughout the case, passed upon the question as if it had this old form, instead of the form which it actually took under the new contract. Under the new form of contract, in the absence of proof as to the condition of the goods, and on proof of the seaworthiness of the ship, the burden was thrust upon the libellant to prove the injury and the cause of the injury. The pleadings in the case are not under the contract, but under an allegation that the goods were injured by the negligent actions of the officers of the vessel. The contract is only inducement. It that were so, then it would clearly come under the control of the statute which has just been cited.

The Courts below say that the ship, although admitted to have been proved seaworthy (Record, p. 164) has, nevertheless, as representing the carriers, another duty in addition to that of being seaworthy, namely, the duty of being guiltless of negligence on the part of the officers. This liability is evidently not a

contract liability, because it is a liability which in this country cannot be avoided by contract. It is a liability from which no one can release the carrier and his ship—not even the Court itself. If, then, the contract has been kept and the parties have received the goods and the whole question turns on negligence on the part of the carrier, how can it be otherwise than a question of tort, at least so far as the Statute of Limitations is concerned? The statute of three years defines this case in apt words (Section 338 of the Code of California, 3; and Section 28 of same Code).

Here seems to be the "analogy" and not Section 337 which applies to an action on a contract, whereas this loss was caused by a negligence which could not be the subject of contract.

Nor can it be said that the obligation as to negligence arises out of the contract and is an incident merely. The California Statute, interpreted by the Supreme Court of that State, expressly negatives this idea. Indeed, it would be strange if we were bound by a contract on a subject where we could not make a contract.

We say that not only does the libel (Article III.) sound *in tort*, as quoted by the Court (Record, p. 216), but the case as put is one *of tort* and cannot, in view of the California Statutes, be deemed anything but a proceeding *in tort*, covered by the language and intent of Section 338 (Record, p. 12, Section 338 California Code.

On the general question, outside of its relations to California Statutes, it seems clear that such an action as this is *in tort*.

Of this opinion was the Supreme Court in the John G. Stevens (170 U. S., 113). On page 124, Mr. Justice GRAY, when it was urged upon him "that the liability of a tug for the loss of her tow was analogous to the liability of the common carrier for the loss of the goods carried," replied: "But even an action by a passenger or by an owner of goods against a carrier for

neglect to carry and deliver in safety is an action for the breach of a duty imposed by law independent of contract or of consideration, and is, therefore, founded in tort" (citing Phila. & Reading R. R. vs. Derby, 14 How., 468; A. & P. R. R. vs. Laird, 164 U. S., 393; W. U. Co. vs. M. & O. R. P. Co., 21 Fed. Rep., 896–902.

See, also, The Quickstep, 9 Wall., 665, 667, where in a similar case, though the contract of towage was alleged, the Court held the proceeding one in tort.

The Courts below, however, held that the statute, if any, which is applicable to this case is the statute which has been cited third in our list.

Limitation of Four Years.

But if the Court is right on this interpretation of the statute, although it is contrary to the interpretation given to it by the Supreme Court of the State of California—an interpretation which ought to be binding upon all courts (see Thomas vs. Pacific Beach Co., 111 Cal., 136–139; McCarthy vs. Mt. Tecarte Co., 111 Cal., 328, 340; Chapman vs. Morrill, 20 Cal., 131, opinion by Field, C. J.)—nevertheless, we have this to say: that the four years mentioned in that statute have run against this action. We have already argued the question of the presence of the RES in the Northern District of California as being absolutely essential to confer jurisdiction upon the Court. Without abating anything from the claim which we have made in this behalf, there is still another claim which can be made under this Statute of Limitation. That statute provides that no action shall be commenced after four years. It will be claimed that the four years began to run from the time of the filing of the libel, because the statute of California declares that the commencement of the suit shall date from the filing of the complaint; but the statute of California,

when it referred to the filing of the complaint as the commencement of the suit, must have meant the filing of a complaint which was in accordance with law. A complaint lacking an essential component part could not be the commencement of any suit, at least during the period when the defect remained uncured. The Court could not have had jurisdiction of this case on the 28th of April, either actual or potential, because the *res* was not within the district, and the libel could not be said to be properly filed until such was the case. The fact that there was a false assertion that the *res* was in the Northern District does not help the matter at all. Nor is there any evidence that the *res* was in the District until May 4th. Even if the Court should hold that an action could be considered as properly commenced as soon as the *res* was in the district, it could not hold that this action was properly commenced until the fourth of May. At that time, even under the farthest limit of the statutes of California, the right to bring an action had ceased. It does not seem possible to us that the Court can say that the libellant can make any progress by rea-on of an asseveration in the libel which he was required to make by the rule of Court, but which was not true.

In Bailey vs. Sundberg (49 Fed. Rep., 583, 585) the Court decided that under Rule 9 of Admiralty not only must process *in rem* be served by arresting the property, but by publication. There was no notice by publication given as required by Rule 9. Hence the proceedings did not bind the *res*, but only the parties, either nominal or participant, by appearing on the record, and engaging, as they must have done, actively in the defense. It was in effect a suit *in personam*.

If Rule 9 must be obeyed, why must not Rule 23? If disobedience of Rule 9 changes an action from *in rem* to *in personam*, and binds parties solely because they appeared and took up the burden, does not disobedience of Rule 23 at least make the cause com-

mence with the seizure and not with a void or voidable procedure?

Baily vs. Sundberg proceeds upon the basis that "the rule has the force of a law of Congress" (p. 585).

As to the Merits of the Case.

Two questions seem to arise upon the merits of the case, mainly growing out of the troublesome question as to where the burden of proof rests at certain stages of the hearing. Originally, the form of a bill of lading admitted that the goods were received "in good order and condition," and in that case the presumption naturally arose that the goods were in good order and condition, or otherwise they would not have been so receipted for. Later, it became evident, especially in the case of general shippers, that this method of receipt was too binding upon the common carriers, and the language of the receipt was, therefore, changed.

In this case, the language of the receipt was: "In apparent good order, except as noted, value, weight, contents and condition of contents being unknown to the said Company." It seems to us that the courts below have throughout this case made confusion between these different forms of bills of lading and have treated this case as if it came under the ancient form of receipt; but it will be noticed that the receipt says only "apparent good order," which certainly must mean something different from "good order and condition," as used in the old form of receipt, especially with full disclaimer as to "contents and condition of contents." The ship owner, under the ancient form of contract, having acknowledged receipt of the goods in "good order and condition," there remained only on the part of the shipper an obligation to show that the goods were damaged. Our contention is that, in cases where goods are received under such limitations as were made in the contract in this case, the bill of

lading is not proof sufficient for the shipper to rest his case upon, and he must offer proof as to what the contents were of the various packages, the condition of contents and the condition generally. If he shows that, and then shows the damage to the goods, he is in the same position and occupies the same status that the shipper did who had a receipt which certified that his shipments were in good order and condition. In this case no proof whatever was offered as to the condition of the contents or as to the weight or (as we shall contend on another point) as to the value. Therefore, no case has been made out at the inception.

Upon this point the cases are so numerous that one hardly knows where to begin.

The 5th Am. and Eng. Encyc. of Law (2d Ed., pp. 533–4) lays down the law in such cases as follows:

> "There is no presumption that the goods were in good order when received by the carrier" (citing Marquette, etc., vs. Kirkwood, 45 Mich., 51; Smith vs. New York, &c., R. R. Co., 43 Barb., 225).

The fourth volume of the same work, page 523, says:

> "A bill of lading which acknowledges the receipt of a specified number of packages, but contains the phrase 'contents unknown,' cannot ordinarily be evidence of what the packages contained."

Our case is still stronger, for the receipt says: "apparent good order, weight, value, contents and condition of contents unknown."

Vennard vs. Hudson, 3 Sumn., 405, 407.
The California, 2 Sawy., 12.
Hadden vs. Parry, 3 Taunton, 303.
Fassett vs. Ruark, 3 La Ann., 694.
Miller vs. Hannibal R. R. Co., 90 N. Y., 430.
See, also, Clark vs. Barnwell, 12 How., 272, 273.

The following citations show that the libellant must in such cases prove the condition of the goods :

Schults vs. The Pietro G., 40 F. R., 497.
The Andover, 3 Blatch., 303.
Nicol vs. Castle, 9 Bombay H. Ct. R., 321.
Jessell vs. Bath, L. R. Q., Exch., 207.
The Vicenzo T., 10 Ben., 228.
The Columbo, 3 Blatch., 521.
Wentworth vs. The Ship Realm, 16 La. Ann., 18.

The case on which special reliance is placed apparently by both sides is that of Clark vs. Barnwell, 12 How., 373. There the Court laid down the proposition that " the bill of lading admits that the 24 boxes were shipped in good order, and bound the respondents to deliver the same in like good order, all and every the damages and accidents of the seas or navigation of whatsoever nature and kind excepted." That was the starting point in that case. In our case that starting point was never reached, because there was neither a bill of lading admitting " good order " nor an equivalent therefor in the way of evidence as to contents and condition of contents. Had those things been established, the first part of the opinion would have been applicable. Assuming, however, that this had been done, which it had not, the main question in the case is (says the Court), " whether or not the damage in question was occasioned by one of the perils and accidents within this bill of lading—the clause relating to dangers and accidents of the sea and navigation." After the damage to the goods, therefore, has been established, the burden lies upon the respondents to show that it was occasioned by one of the perils from which they were exempted by the bill of lading. That peril we show upon proof of the stranding of the vessel, which stranding is regarded, from the facts in the case, by the Circuit and District Courts, as being the proximate cause of the injury. The case having reached this point, the language of the Court in Clark

vs. Barnwell again becomes applicable: "It is still competent for the shippers to show that it 'the peril of the sea' might have been avoided by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods, for then it is not admitted to be in the sense of the law such a loss as will exempt the carrier from liability, but rather a loss occasioned by his negligence and inattention to his duty. In this state and posture of the case the burden is upon the plaintiff to establish the negligence, as the affirmative lies upon him." Then follows a quotation from Muddle vs. Stryde (9 Carr. & Payne), where Mr. Chief Justice DENMAN states the case before him very strongly, and adds "that the jury would see clearly that the defendants were guilty of negligence before they could find a verdict against them."

The condition did not change when the Court began to seek for the causes of the leakage which rendered the stranding necessary. The burden rested on the libellant to show negligence, because the seaworthiness of the vessel had been already proven in the manner suggested by Judge HOFFMAN in the case of The Compta (4 Sawyer, 377). The Court cite many cases which they regard as parallel to this and involving the same idea, where the Courts decide that the presumption of unseaworthiness can arise, even after direct proof has been made, from the circumstances attending the nature of the accident; but in all these cases, where it has been so decided, the cause of the misfortune has been discovered, and the Courts have passed upon the bearing of that discovery, and have determined that the ship was not seaworthy when she started, because of the condition of things which has been explained. In this case there has been no ascertainment of the cause of the leak which led to the stranding of the ship, and the District and the Circuit Court naturally comment upon the absence of that evidence and think that it entitles them to infer that the vessel was unseaworthy, because the claimants of the

ship did not set forth any proof, if they were able, as to what was the remote cause. The Court says: "The real and efficient cause of the leak is not disclosed by the evidence" (Record, p. 220).

But what seems to militate against such an argument is the fact that that question was not gone into for some reason entirely unknown so far as the case discloses, but the refusal to get whatever testimony they could upon that subject rests not only upon the claimant, but also upon the libellant and upon the Court.

At page 104 of the Record we find the following:

"MR. ANDROS: If you did discover (I am not asking whether you did or not) the place where the leak was, was it below the water line when the ship was on an even keel?"

The parentheses shows that he, too, was avoiding any direct testimony on the subject. Thus, it will be seen that the proctor for the libellant declined to go into that question, and the Court finally withdrew the preliminary questions which might have led to it, each party, and also the Court, being content to rest upon the presumption of law as he understood it. Under such circumstances the natural inference that the party who did not fully disclose should be made to suffer the consequences by having all probabilities taken against him, does not seem to be properly effectual, so that the case stands on the merits in this way: First, the case for the libellants has not been proved, for he has not shown whether the goods were in good order and condition, nor what the contents were. He has, therefore, failed in the foundation of his action. Second, if he had done so, the next question would be whether this loss was by peril of the sea. Damage by salt water, whether caused by stranding or not, is a peril of the sea. Stranding of a ship is certainly *prima facie* a peril of the sea. That being so, the burden rests upon the shipper to show that this ought not to be excepted out of the list of proper damage, because it was caused by

the negligence of the officers or masters of the ship. But the negligence is something which is not to be inferred; it is something which is to be proved. Some acts, at least, are to be proved from which the Court could infer negligence—some acts either of omission or commission, but no such acts have been shown.

The District Court has found (and its finding is not disturbed by the Court of Appeals) that the ship was seaworthy when the voyage commenced, and whether the accident resulted from negligence or from the lack of seaworthiness no one has shown.

It is a very different thing to infer unseaworthiness from a particular defect which is known, such as the defect involved in the case of the Edward L. Morrison (153 U. S., 199), in which the cargo was damaged by reason of the loss of the cap covering the bilge pumphole of the vessel, and where nothing is known. The defense in that case was that it was displaced by a peril of the sea. The District Court entered a decree in favor of the libellant, which was reversed by the Circuit Court. The Supreme Court reversed the decision of the Circuit Court and affirmed that of the District Court. That was a case where the Court inferred from a leak, the cause of which was disclosed, that unseaworthiness must have existed when the ship left port. No such inference, however, can be drawn where the efficient and real cause of the leak is not disclosed or gone into by either party. There is no presumption in favor of unseaworthiness, especially after seaworthiness has been proved by competent testimony. It is true that the parties saw fit not to go into the question, if, indeed, they could have gone into it (Record, p. 104). Neither, therefore, has a right to complain of the legal position in which he finds himself.

The remote cause of the damage, the nature of which is unknown, has two aspects. It either causes a suspicion of unseaworthiness or a suspicion of negligence on the part of the officers of the "Queen." Any sus-

picion as to seaworthiness has been so fully met by us that the Court (MORROW, J.) says (Record, p. 164):

> "Now, if the only presumption of negligence arising out of the damaged condition of the merchandise was that the voyage had been commenced with the vessel in an unseaworthy condition, the Court would be compelled to hold that the claimant had sufficiently answered the *prima facie* case made out by the libellants."
>
> This quotation is only part of the sentence.

There is, moreover, nothing in the opinion of the Circuit Court which disturbs this finding, except, perhaps, inferentially, in the last sentence but one of their opinion.

There remains, then, a suspicion of negligence after the voyage was begun; but as to this last, the burden must be on the libellant; and then no cause of the leak being shown by either party, the remark of Lord DENMAN, approved in Clark vs. Barnwell, comes into action:

> "If, on the whole, it be left in doubt what the cause of the injury was, or if it may as well be attributable to the perils of the sea as to negligence, the plaintiff cannot recover."

If the matter has been in absolute darkness by all parties, there can be no presumption against seaworthiness, and none in favor of negligence.

Whatever effect an unknown cause may have on seaworthiness, it can have none on negligence. That must be proved. It can have none on seaworthiness, for it has been pronounced by the Court that we have met every presumption arising from any evidence in the case, by evidence showing seaworthiness before the voyage commenced (The Edwin, 8 Fed. Rep., 540, 542).

The last sentence of the Circuit Court seems to us to make clear the error into which the Court has

fallen. "Upon all the evidence contained in the record, we are of opinion that the Court did not err in its conclusion that the burden of proof rested upon claimant to show that the leak that was the direct cause which led to the damage of the goods by sea-water occurred by danger of the sea, and that in the absence of any such proof, the presumption of law is that the damage was occasioned either from the unseaworthiness of the steamer or from the carelessness or negligence of the officers and crew on board."

It would seem that the Court erred, first, in assuming that there was any presumption of the law, in the absence of proof as to the exact nature of the cause of the leak, that either the damage was occasioned by the unseaworthiness of the steamer or by the carelessness or negligence of the officers and crew on board. Here are two different propositions: One is the unseaworthiness of the steamer, in regard to which the burden of proof is upon the claimant; and the other is the negligence of the officers, where the burden of proof is upon the libellant; and it cannot be said that, in the absence of proof, there is any presumption of the law as to the unseaworthiness of the steamer, and certainly there is none as to the negligence of the officers and crew on board. Any evidence tending to indicate unseaworthiness we have met. Negligence cannot be suspected, it must be proved; and on the whole case the libellant must sustain his claim.

On this state of the law and the facts we contend:

First. That the libellant, having offered no proof of the sound condition of the goods when received, has failed to establish even a *prima facie* case.

Second. We have shown a seaworthy condition of the vessel, and have so fulfilled our implied warranty in that regard.

This is found as a fact by the District Court

(Record, p. 164). Nor does the Circuit Court otherwise find. The Circuit Court on all the facts finds the cause of the damage unknown, and infers that the ship was unseaworthy *or* that the officers were negligent. An alternative finding of that kind is not a finding of unseaworthiness.

THIRD. As the loss was by a "peril of the seas," the burden was then put upon the libellant to prove that kind of negligence on the part of the officers which would render inoperative the exception by reason of "a peril of the sea." This must be found affirmatively.

The Court, however, have found in the alternative, either negligence *or* unseaworthiness. This is to find neither.

And how could either be found when the Court say (Record, p. 220) "the real and efficient cause of the leak is not disclosed by the evidence?" How can you infer something from nothing?

Damages.

The next contention we make in this case is that there was no evidence presented which justified the damages found by the Courts below.

The theory on which these were adjusted was that the goods were in good order and condition when received, and that, having received the goods back in damaged condition, the libellants were justified in selling them in one lot at auction without any examination or notice to us; and that, thereupon, the libellants were entitled to have of us, as damages, the difference between the proceeds of the auction sale and the cost prices testified to after the lapse of nine years, on the basis of a memorandum made by a clerk, which memorandum was made to inform the company which had insured the goods.

To this claim, sustained by the Court, there are three objections: first, that the condition of the goods when shipped was assumed and not proved; second, that the bill of lading requires the libellant to receive the "cash value at the port of shipment at the date of shipment." On this question of "cash value" no evidence was offered; evidence being presented to show the cost, and even that only from the memorandum already alluded to.

THIRD. The goods were sold at auction, without separation, in one lot, without notice and without our assent. No other testimony as to damage or value was offered.

The first suggestion we have already presented, contending that the absence of proof went to the whole case. We now present this absence of proof of condition as invalidating the estimate of damage. This suggestion and the second suggestion are amply sustained by the authorities which we cite. These authorities sustain the doctrine laid down in Fralof vs. N. Y. & H. R. R. Co., 10 Blatchford, 16, as follows:

> "Neither courts nor juries are permitted to assess values upon conjecture. They must have proof of value, or evidence of such facts as will warrant a deduction of the value with reasonable certainty."

Mr. Justice STORY, in Alfonso vs. U. S. (2 Story, 421), in discussing the term which he considered the equivalent of market value in a revenue case, laid down the principle that the market value cannot be arrived at on a mere purchase made by a single individual, or a purchase made even by a few persons; for in either case, they might have been purchased above or below the market value, or the market value might have been fluctuating.

In The H. F. Dimmock, 77 F. R., 226, Circuit Judge PUTNAM had occasion to discuss the whole question of

values, and calls attention to the fact that there are certain articles which have a recognized market value, and which do not have to be calculated upon, but which are known to the experts. With reference to this great class, to use his own expression, " the cost is no proper element, and if admitted at all in evidence, is admitted * * * for the purpose of leading up to a determination of what the market value is."

To the same end are the following cases, which are somewhat the same as the case cited from Story above :

Goodwin vs. U. S., 2 Wash., 493.
Tappan vs. U. S., 2 Wash., 327, 400.
U. S. vs. Tappan, 11 Wheat., 419.
U. S. vs. Sixteen Packages, 2 Mason, 48, 54.
Wehle vs. Haviland, 69 N. Y., 448.

The testimony of Mr. Haas, the only testimony in the case, has been already described. It related to the " cost price ", which, as the Court said in the H. F. Dimmock case, " is no proper element."

The third objection relates to the auction sale.

It is for the interest of the whole community that the value of goods which are damaged should be proved in the utmost good faith, for the goods, like the goods in this case, being turned over to the libellant and being in his sole possession, must be treated in a fiduciary way, with the utmost care and the utmost openness. No one will say that the turning over of 1,551 packages to an auctioneer, and the sale of them in one lot, is the fulfillment of the duty the libellant owed to the claimant.

The Marinin S., 28 F. R., 664, 668.
Wolf vs. The Vaderland, 18 F. R., 733, 736.
Nouson vs. Dent, 8 Moore, P. C., 419.

It is noteworthy that the only cases cited by the Courts below in support of their views of the validity of the auction sale as fixing the value of the goods alleged to have been damaged had in the facts the important element that the master had notice and

assented to the sale. This is so stated directly in the second case, and must be inferred in the first from the expressions of the Judge as to the relative duties of the consignee and the master. Here there was no notice to the master or to the claimant, and no separation of the sound merchandise from that which was damaged, and no testimony as to the damage. Even the auctioneer can only say (Record, p. 65) that the goods were damaged, but how much he did not recollect. He would not even say they were wet.

See the cases cited by the Court :

The Columbus Federal cases, 3041.
The Columbus Federal cases, 3042.

Principal Points Restated in Brief..

FIRST. That libel was never properly filed, because the *res* was not in the district when it was filed, and Rule of Court No. 23 was not truthfully complied with.

SECOND. The case comes under one of the three California Statutes of Limitations :

(a) The one year statute, which expresses exactly the limitation which the law of California desires to put upon this precise case ; or

(b) If not ; then the statute which applies to cases of tort—this cause sounding in tort ; or

(c) If the case is one of contract, then by the law of California the period of four years had elapsed between the accruing of the cause of action and the true commencement of the action, the true and proper filing of the libel, if it ever was truly and properly filed.

THIRD. On the question of the barring of the suit either by failure to make claim within thirty days, or by failure to bring suit within thirty days, that the parties having made the contract, are bound by these

stipulations, which are two in number; thirty days to make claim, and thirty days in which to bring suit; and these are independent, each standing on its own merits.

FOURTH. On the merits of the case:

(a) We contend that the bill of lading does not exempt the libellants from proof as to the condition and nature of the articles shipped, and, no proof having been offered on that subject, the libellant has failed to make out a case.

(b) We having proved the seaworthiness of the steamer, and that the loss was by a peril of the sea, the burden then fell upon the libellant, not to raise a suspicion, but to furnish proof of negligence.

(c) Negligence not being proved, the libel should have been dismissed.

FIFTH. As to the damages:

(a) The condition of the goods when received not having been proved, one essential for fixing the amount of damage was not proved.

(b) The sale by auction, with no other proof of the nature of the injury, did not furnish the other element suitable to fix the damage.

Point applicable to that part of the libel which concerns libellants Haas, Baruch & Hellman.

The Court below have decided that the Magdebourg General Insurance Company is entitled to judgment on this behalf in the name of Haas, Baruch & Hellman, surviving partners. This conclusion the Court comes to without proof or any evidence either that the goods were insured, or that the insurance company have paid the insurance. The Court even went so far as to refuse to let us ask Mr. Haas if he was insured (see error, Nos. 9, 29, 30 and 31). Either the assignment of error No.

9 is good, or those of Nos. 29 to 31 are good. If the case be claimed to be one of subrogation, surely it must be proper to ask if there was any insurance.

We have endeavored to argue the principles involved in all the errors assigned, but none of the errors are intended to be waived by any omission.

Lastly.

The decrees appealed from should be reversed with costs.

Respectfully submitted,

THOMAS B. REED,

Counsel.